United States Court of Appeals for the Second Circuit



BRIEF FOR APPELLEE

76-7050

To be argued by James E. Tolan

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7050

Marx & Co., Inc., John V. Summerlin, Jr., Otto Marx, Jr., William D. Fugazy and Louis V. Fugazy,

Plaintiffs-Cross-Appellants,

against

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION AND THE CONTINENTAL INSURANCE COMPANY,

Defendants-Cross-Appellees,

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants,

against

JOHN V. SUMMERLIN, JR., OTTO MARX, JR., WILLIAM D. FUGAZY AND LOUIS V. FUGAZY,

Plaintiffs-Appellees.

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ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS APPELLES D AND CROSS-APPELEANTS

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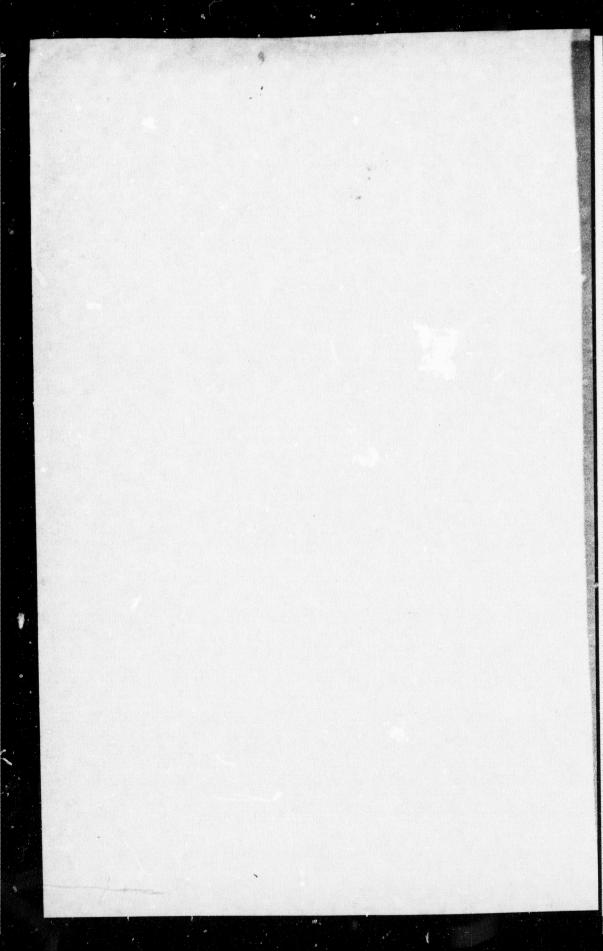


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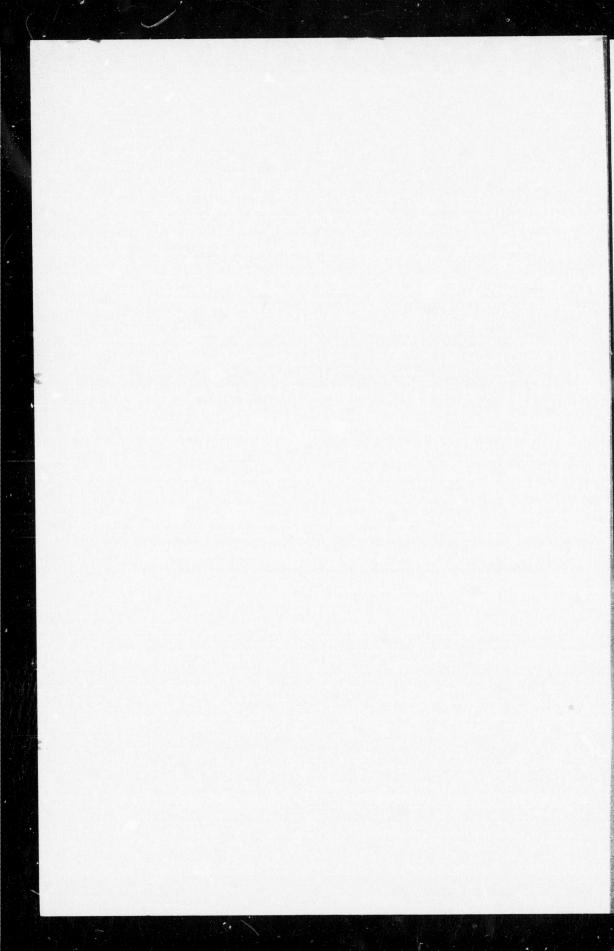
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BRIEF FOR PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS

Preliminary Statement

After a three-week trial resulting in a jury verdict for plaintiffs and after the Trial Court's carefully reasoned opinion denying defendants' post-trial motion, defendants now come into this Court and argue surprise and unfairness with respect to plaintiffs' breach of contract claim. Defendants' claims of surprise and unfairness are totally unfounded. The judgment entered upon the jury's verdict in plaintiffs' favor on their breach of contract claim should be affirmed in all respects.

At trial, plaintiffs offered proof on three claims: (a) that defendants The Diners' Club, Inc. ("Diners'"). Diners'/Fugazy Travel, Inc. ("DFT"), The Continental Insurance Company and The Continental Corporation (referred to herein as "Continental") fraudulently induced plaintiffs in 1967 to sell Fugazy Travel Bureau, Inc. ("Fugazy Travel Bureau") to Diners'; (b) that plaintiffs Marx, William D. Fugazy and Louis V. Fugazy were fraudulently induced in 1968 to agree to an amendment of their employment contracts; and (c) that Diners' breached its contractual obligation to promptly file and use its best efforts to cause a registration statement to become effective so as to permit the sale of plaintiffs' restricted Diners' Common Stock to the public. The Trial Court directed a verdict against plaintiffs on their first claim and submitted the remaining two claims to the jury. The jury returned a verdict in plaintiffs' favor on their breach of contract claim.

Defendants counterclaimed for fraud in the acquisition and breach of fiduciary duty seeking \$30 million in damages. Those claims were tried, submitted to the jury, and totally rejected by it.

Defendants then moved for judgment n.o.v. or, in the alternative, for a new trial or remittitur, raising every argument now presented on this appeal. Defendants' motion was denied in all respects. Thereafter, on motion by plaintiffs, the Court awarded plaintiffs prejudgment interest on the sums awarded by the jury on their breach of contract claim. Final judgment with respect to all claims presented at trial was entered on January 6, 1976 (R. 158 [A464]).*

^{*}References to the Joint Appendix shall be designated as "A ". References to the pages of the Joint Appendix will be included herein in addition to the initial references to the Record on Appeal, trial transcript and trial exhibits. Accordingly, references to the Record on Appeal shall be designated as "R [A]"; to the Trial Transcript "Tr. [A]"; to plaintiffs' trial exhibits marked into evidence "P. Exh. [A]"; and to defendants' trial exhibits marked into evidence and marked for identification "D. Exh. [A]".

Defendants have appealed from the judgment entered on the jury's verdict in plaintiffs' favor on plaintiffs' breach of contract claim and defendants' counterclaims (R. 160 [A470]). Plaintiffs have cross-appealed from the Trial Court's directed verdict in defendants' favor on plaintiffs' claim of fraud in the acquisition (R. 176 [A503]).

Counterstatement of the Issues

A. Defendants' Appeal

- 1. The Trial Court properly denied defendants' motion for judgment n.o.v. and for a new trial with respect to the jury's verdict that Diners' breached its contractual obligation to promptly file a registration statement and use its best efforts to cause such registration statement to become effective because the evidence established that:
 - a) Diners' did not promptly file the registration statement and did not use its best efforts to cause the registration statement to become effective;
 - b) Diners' acted in bad faith, thereby hindering performance of the reimbursement and indemnity provisions of the contract;
 - c) Diners' alleged affirmative defense of "accord" was never tried; and
 - d) The testimony by plaintiffs' expert witness was proper.
- 2. The Trial Court properly denied defendants' motion for judgment n.o.v. and for a new trial with respect to the jury's verdict in plaintiffs' favor on defendants' counterclaims because the jury verdict is fully supported by the evidence.

B. Plaintiffs' Cross-Appeal

1. The Trial Court improperly directed a verdict at the conclusion of plaintiffs' case-in-chief on plaintiffs' claim

that defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, promulgated thereunder, with respect to the acquisition in 1967 of Fugazy Travel Bureau by Diners' because plaintiffs made out a *prima facie* case that material misrepresentations concerning the timing of the Continental takeover were made by defendants and relied upon by plaintiffs in agreeing to the acquisition.

Counterstatement of the Case

A. Proceedings Before Trial

The record belies Diners' assertions that it was surprised at trial by plaintiffs' claims of breach of contract. Plaintiffs in their complaint set forth the three claims that were tried before the Court and to the jury (R. 33 [A14]; 161 [A472]). Moreover, a joint pretrial order was filed in March 1975 which set forth the three claims that plaintiffs expected to present at trial, including plaintiffs' claim that Diners' violated Section 10.2(b) of the October 10, 1967 acquisition agreement which required Diners' "to promptly file a registration statement and use its best efforts to cause such registration statement to become effective" (R. 115 at 9 [A56]).

B. The Trial

Trial of the action commenced on May 6, 1975 and continued over twelve trial days. At the commencement of trial plaintiffs handed up to the Trial Court and served upon defendants' counsel a trial memorandum which set forth the facts and the law supporting each of plaintiffs' three claims (R. 126 [A99]). Each of these claims, including plaintiffs' breach of contract claim, was outlined by plaintiffs' counsel in his opening to the jury (Tr. 10-34 [A941-A965]) and was recognized and responded to by defendants' counsel (Tr. 34-55 [A965-A986]).*

^{*}Defendants' counsel specifically responded to plaintiffs' breach of contract claim at page 55 of the trial transcript [A986].

At the close of plaintiffs' case defendants made their first of several motion, with respect to each of plaintiffs' claims. The Trial Court denied defendants' motions with respect to plaintiffs' claim of fraud in the amendment of the employment contracts and Diners' breach of its contractual obligation. It granted defendants' motion for a directed verdict with respect to plaintiffs' claim that defendants fraudulently induced plaintiffs in 1967 to sell their company to Diners' (Tr. 903-26 [A1330-A1354]). Defendants' renewed their directed verdict motion with respect to plaintiffs' remaining claims at the conclusion of the case, which motion was denied (Tr. 1807-36 [A1581-A1612]).

The Trial Court charged the jury* and defendants raised only one minor objection to the entire jury charges, which objection has no relevance to the instant appeal (Tr. 1984-85 [A1659-A1660]). The Trial Court decided to utilize a special verdict form which set forth each of plaintiffs' claims, including their breach of contract claim. This form was reviewed and approved by counsel for both sides prior to its submission to the jury (Tr. 1977-80 [A1652-A1655]).

On May 27, 1975, the case was given to the jury and on May 28, 1975, the jury returned its special verdict against plaintiffs on their claim for fraud with respect to the amendment of their employment agreements and against defendants on their \$30 million counterclaims. The jury returned a verdict in plaintiffs' favor with respect to their claim that Diners' had breached its contractual obligation to promptly file a registration statement and use its best efforts to cause the registration statement to become effective. The jury awarded plaintiffs damages in the following amounts:

John V. Summerlin	\$ 44,000
Otto Marx, Jr.	240,000
William D. Fugazy	124,500
Louis V. Fugazy	124,500

(Tr. 2007-09 [A1661-A1663]).

^{*}The Trial Court's instructions to the jury are annexed as Appendix A hereto.

C. The Con S's Opinion

Each of the arguments presented by defendants on appeal was previously raised in their post-trial motion and each argument was carefully reviewed and properly rejected by the Trial Court in its opinion. (R. 145 [A403]—Marx & Co. v. The Diners' Club, Inc., 400 F. Supp. 581 (S.D.N.Y. 1975)). A copy of the Trial Court's opinion is annexed as Appendix B hereto.

The Trial Court first reviewed the facts relating to plaintiffs' breach of contract claim and found that "the evidence presented was certainly sufficient to permit the case to go to the jury" and that "plaintiffs presented sufficient evidence to make out a prima facie case that Diners' had breached its agreement by failing to promptly file a registration statement" (R. 145 at 4 [A408]).

Turning to Diners' argument that it used best efforts to cause the registration statement to become effective, the Trial Court rejected that contention and noted that the registration statement never became effective and that it was withdrawn in early 1970 over plaintiff Marx's protest (R. 145 at 5 [A409]).

Similarly, the Trial Court rejected defendants' argument that the delay in registration was occasioned by plaintiffs' failure to perform certain conditions precedent because the evidence presented at trial was such that "the jury could have reasonably concluded that Diners' acted in bad faith and thereby prevented or hindered performance of the conditions precedent in order to avoid its obligation to file a registration statement" (R. 145 at 6 [A409-A410]). The Trial Court further noted that these contentions of Diners' were covered in the Court's charge to the jury and, since defendants made no objections, Rule 51 of the Federal Rules of Civil Procedure precluded defendants from complaining (R. 145 at 6-7 [A410-A411]). The Trial Court also rejected Diners' argument that the parties entered into an accord on August 27, 1969, pointing out that Diners' did not affirma-

tively plead that defense, as required by Rule 8(c) of the Federal Rules of Civil Procedure, and never raised the defense at trial (R. 145 at 7 [A411]).

With respect to defendants' objections to the testimony of Stanley Friedman, plaintiffs' expert witness on their breach of contract claim, the Trial Court rejected defendants' arguments that Friedman was a surprise witness and an improper rebuttal witness (R. 145 at 9-10 [A412-A413]). In addition, the Trial Court found that it was not prejudicial error to allow Friedman to give his opinion as to when the registration statement should have been filed, or the time within which the registration statement should have become effective, or to allow him to testify in reliance on the 1970 SEC Annual Report (R. 145 at 9-10 [A413-A414]). Furthermore, the admission of Friedman's expert testimony was subject to the limiting instructions of the Court given at trial (R. 145 at 10 [A414]).

The Trial Court next turned to defendants' counterclaims. As in this appeal, defendants' primary claim related to the Travelco, Inc. ("Travelco") transaction—that plaintiffs maintained an interest in Travelco, undisclosed to defendants, in violation of the acquisition agreement and in violation of their fiduciary responsibilities. The Trial Court found that the plaintiffs introduced sufficient evidence to refute defendants' claim, that the jury was correctly charged on the law, and that defendants failed to satisfy their burden of persuasion (R. 145 at 10-12 [A414-A415]).

D. Prejudgment Interest

On motion by plaintiffs pursuant to Section 5004 of the New York Civil Practice Law and Rules and Rule 58 of the Federal Rules of Civil Procedure, the Trial Court awarded plaintiffs prejudgment interest, as a matter of right, on the jury's award from September 2, 1969 (R. 148 [A419]; 149 [A425]; 157 [A456]). A copy of the Trial Court's opinion is annexed as Appendix C hereto. The Court noted that plaintiffs' breach of contract claim had been thoroughly liti-

gated at trial and that the jury awarded damages to plaintiffs on the basis that the registration statement would have become effective by late Avgust 1969 had Diners' not breached its contractual obligation (R. 157 at 5 [A461]). The Court therefore reasoned that the earliest ascertainable date plaintiffs' contract cause of action existed was September 2, 1969 and awarded interest from that date (R. 157 at 5 [A461]). The Court stated that defendants' argument against that date was "an attempt to relitigate the question determined adversely to them by the jury and by this Court on their motion for a new trial or remittitur" (R. 157 at 5 [A461]).

Counterstatement of the Facts

Introduction

Plaintiffs are compelled to present a counterstatement of the facts so that the facts actually presented at trial and upon which both the jury and the Trial Court properly found in plaintiffs' favor are fully set forth before this Court.

A. Plaintiffs' Breach of Contract Claim

On October 10, 1967, Diners' and Fugazy Travel Bureau entered into an agreement pursuant to which Diners' acquired the assets of Fugazy Travel Bureau for stock and other consideration (P. Exh. 5 [A513]). Plaintiffs, the shareholders of Fugazy Travel Bureau, received restricted Diners' Common Stock which precluded them from reselling, distributing, or otherwise disposing of their shares in the absence of an effective registration statement under the Securities Act of 1933 or unless Diners' received from its counsel an opinion to the effect that registration was not required (P. Exh. 5 at § 10.1(a) [A554]. Section 10.2 (b) of the agreement explicitly provided for the registration of plaintiffs' restricted shares upon notice by plaintiffs that they desired Diners' to file a registration statement:

"If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may, at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a 'no-action' letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements. as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees. printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit). legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement." (P. Exh. 5 at § 10.2(b) [A556]).

As required, plaintiffs notified Diners' on April 16, 1969 that they were requesting Diners' to file with the SEC a registration statement with respect to their shares of Diners' Common Stock (P. Exh. 27 [A661]; Tr. Marx 700 [A1250]; Summerlin 559-61 [A1186-A1188]; L. Fugazy 615-16, 636 [A1206-A1207, A1216]; W. Fugazy 202-04 [A1073-A1075]). Instead of proceeding promptly to prepare and file the registration statement as required by the acquisition agreement, Diners' communicated with two of

its directors to determine what action should be taken. George Faunce, president of Diners', forwarded a copy of the request for registration to Harold Johnson, executive vice president of Continental and a director of Diners' (Tr. Johnson 1184, 1186 [A1397, A1399]). On that copy, Faunce wrote:

"Harold—Alfred [Bloomingdale, chairman of the board, president and chief executive officer of Diners'] asked me to send this to you and Mr. Herd. He wants to know your position?—George." (P. Exh. 27 [A661]).

Faunce also sent a copy to J. Victor Herd, chairman of the board of Continental* and a director of Diners' (Tr. Herd 1228, 1230 [A1408, A1410]). On Herd's copy, there are two notations. The first notation, by Faunce, states:

"Mr. Herd—Alfred asked that I send this to you and Harold—George."

The second notation, by Herd, states:

"Mr. Harold Johnson—Anything we should be doing?—J.V.H." (P. Exh. 28 [A663]).

Faunce did not inform any other members of the Diners' board of plaintiffs' request or take any other action (Tr. Faunce 1702 [A1483]).

By letter dated April 24, 1969, Johnson responded to Herd's handwritten notation:

"The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.

^{*}Continental was a principal shareholder of Diners' from the time that plaintiffs first began negotiating with Diners' through the time that Continental made a tender offer for Diners' Common Stock in February 1970. As of June 9, 1969, Continental owned 34 percent of Diners' Common Stock, excluding Continental's right to convert certain debentures into Diners' Common Stock, which right if exercised, would have increased Continental's percentage ownership of Diners' Common Stock to 44 percent. Under the federal securities laws Continental was deemed a "parent" of Diners' (P. Exh. 30 at 17-18 [A684-A685]).

"To my way of thinking there is nothing that needs to be done at the present time. Mr. Bloomingdale may discuss this at a later date but my reaction is to do nothing." (P. Exh. 29 [A665])*.

Diners' did indeed do nothing to prepare the registration statement; it was not until late July 1969, more than three months after plaintiffs requested registration, that Diners' belatedly began the preparation of the registration statement.

Jules T. Asch, Diners' executive vice president, who was responsible for the preparation of the narrative portion of the registration statement, the history and description of the business, did not even begin to work on the registration statement until sometime in July 1969. Once he got started, it took him less than three weeks from beginning to end to complete his portion (Tr. Asch 1169-70 [A1389-A1390]).

As early as June 6, 1969, Diners' had at its disposal its most current audited financial statements, for the year ended March 31, 1969, from which to complete the financial portion of the registration statement. The report of Touche, Ross, Bailey & Smart, Diners' certified public accountants, is dated June 6, 1969 (P. Exh. 31 [A729, A752]). Those financial statements were contained in Diners' 1969 annual report which was dated June 16, 1969. Yet, it was not until August 28, 1969 that those same financial statements were filed with the SEC in the registration statement requested to be filed by plaintiffs on April 16, 1969 (P. Exh. 30 [A666]).

Diners' did everything in its power to avoid registration. Even prior to the time that Marx notified Diners' that plaintiffs were requesting registration, Marx was approached by

^{*}In their "statement of facts," defendants attempt to excuse Johnson's "do nothing" admission. Significantly, defendants excuse is totally unsupported by any reference to the trial transcript. In fact, Johnson, called to testify by defendants, never explained away his statement (Brief for Defendants-Appellants at 16 (hereinafter "Defendants' brief"); Tr. Johnson 1184-1227).

Bloomingdale, Diners' chief executive of cer, who asked Marx if he was going to request registration. Marx informed Bloomingdale that he planned to request registration and Bloomingdale responded by stating "is this necessary?" (Tr. Marx 872 [A1319]). After the request for registration was made, George Faunce and Alfred Bloomingdale approached William Fugazy and asked him to talk to Marx to convince Marx to drop his request for registration because Diners' was concerned with the disclosure of certain problems that it was having (Tr. W. Fugazy 304-13 [A1109-A1118]). Marx was also approached directly by Diners' to find alternatives to registration (Tr. Marx 872-73 [A1319-A1320]). After Diners' received the letter of comments from the SEC, Julian Weber, Diners' counsel, and Seymour Flug, Diners' senior vice president-finance, visited Marx and requested him to withdraw the registration statement because correcting the deficiencies cited by the SEC would "have a very deleterious effect on [Diners'] earnings" (Tr. Marx 875 [A1322]). Immediately thereafter, Marx had a luncheon meeting with Faunce, at Faunce's urging, during which Faunce reiterated Diners' request that Marx permit Diners' to either postpone or withdraw the registration statement (Tr. Marx 875-75A [A1322-A1323]).*

Pursuant to Section 10.2(b) of the acquisition agreement, plaintiffs were obligated "to reimburse Diners" for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners' for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such regis-

^{*}Neither Marx, nor any of the other plaintiffs, ever agreed to withdraw the registration statement. Defendants argue that a proposed letter agreement from plaintiffs to Diners', Exhibit MMMM, was an agreement by plaintiffs to withdraw the registration statement ([A903]; Defendants' brief at 17). In fact, Exhibit MMMM is merely a good faith proposal by plaintiffs, which acknowledges Diners' reluctance to file the registration statement. Plaintiffs' proposal was rejected and Diners' obligation to use its best efforts to cause the registration statement to become effective remained in full force.

tration statement" (P. Exh. 5 [A556]). In plaintiffs' request for registration, they offered to meet that obligation (P. Exh. 27 [A661]).

However, as part of its overall strategy to avoid its contractual obligation, Diners' continually revised its estimate of the cost of registration and did not even request plaintiffs to tender one-half of the cost of registration until July 15, 1969, three months after plaintiffs' request for registration. On that date, George Faunce requested Otto Marx to tender to Diners' \$35,135, which was to represent one-half of the cost of registration (D. Exh. PPP [A879]). The July 15, 1969 estimate of \$70,270 given plaintiffs as the cost of registration is in sharp contrast to Diners' internal estimate of May 16, 1969 that the total cost of registration would only be "in the neighborhood of \$30,000", of which plaintiffs' share would have been \$15,000 (P. Exh. 55 [A799]).

Four weeks after the July 15, 1969 request, on August 15, 1969, Diners' counsel forwarded a second letter to Marx, revising downward by \$14,000 the estimate of the cost of registration and requesting that Marx forward a check in the amount of \$28,120, representing one-half of the revised amount (D. Exh. QQQ [A881]). Subsequently, Marx had a discussion with Bloomingdale concerning Diners' inability to accurately determine the costs of registration. That discussion resulted in Otto Marx agreeing to reimburse Diners' for one-half of the registration expenses "after the registration statement is effective within 30 days after [receipt] of the itemized bills approved by both parties" (D. Exh. RRR [A884]). Marx, by letter dated August 22, 1969 to Diners' counsel, agreed to personally guarantee that the registration expenses would be paid (D. Exh. P [A818]). That August 22, 1969 letter was subsequently modified by a letter dated August 25, 1969 from Marx and William Fugazy to Diners', whereby Marx and William Fugazy together personally guaranteed that the registration expenses would be paid (D. Exh. WWW [A889]).

Plaintiffs were also obligated under Section 10.2(c) of the acquisition agreement to deliver to Diners' an indemnity agreement in customary form indemnifying Diners', its officers, directors and any person controlling Diners' against liabilities based on untrue statements in or omissions from the registration statement made in reliance upon information furnished Diners' by plaintiffs (P. Exh. 5 [A557]). That obligation again was utilized by Diners' to delay the registration process.

In accordance with Section 10.2(c), plaintiffs in their April 16, 1969 request for registration specifically offered to provide the indemnity (P. Exh. 27 [A661]). Yet, defendants did not raise the whole indemnification question until August 1969, months after the request for registration was made (D. Exhs. SSS [A885]; TTT [A886]; VVV [A888]).

Diners' finally filed the registration statement on August 28, 1969, four and one-half months after plaintiffs' request (P. Exh. 30 [A666]). The textual portion of the registration statement was similar to that contained in Diners' 1969 proxy statement and annual report (P. Exhs. 13 [A628]: 31 [A729]). The most current financial statements contained in the registration statement were Diners' audited financial statements for the fiscal year ended March 31, 1969, with Touche, Ross, Bailey & Smart's certificate dated June 6, 1969 (P. Exh. 30 [A702-A711]).

On October 16, 1969, the SEC transmitted its letter of comments to Diners' on the non-financial portion of the registration statement (P. Exh. 39 [A773]). Diners' did not amend its registration statement in accordance with the SEC's letter of comments. Instead, over plaintiffs' protestations, it withdrew the registration statement (Tr. Marx 875-75A [A1322-A1323]).*

^{*}Defendants in their "statement of facts" cite to page 875 of the trial transcript for the proposition that plaintiffs agreed to withdraw the registration statement (Defendants' brief at 12, 17). In fact, Marx testified at this point in the trial that he refused to withdraw the registration request despite Diners' urgings.

By letter dated February 18, 1970, Diners' requested that the SEC consent to the withdrawal of the registration statement (P. Exh. 41 [A781]). Plaintiff Marx, in a letter to Diners' counsel dated March 11, 1970, stated that he would not agree to the withdrawal of the registration statement unless he received an opinion from Diners' counsel that registration was no longer required. Marx stated that in the absence of such an opinion, he was requesting Diners' to reinstate the registration statement and thereby meet its contractual obligation under the October 10, 1967 acquisition agreement (P. Exh. 42 [A783]). The opinion requested by Marx was not forthcoming and instead Diners' counsel forwarded to Marx a copy of an opinion dated February 20, 1970 which merely dealt with the transferability of plaintiffs' shares in a tender offer (P. Exh. 43 [A784]).

On February 6, 1970, Continental had made a tender offer to the shareholders of Diners' Common Stock at \$15 per share (P. Exh. 26 [A657]). Since the registration statement was not going to become effective, plaintiffs were compelled to and did tender their Diners' shares to Continental (Tr. W. Fugazy 198 [A1069]; Summerlin 560 [A1187]; L. Fugazy 615 [A1206]; Marx 702 [A1252]).

B. Plaintiffs' 1967 Claim

Diners' contractual obligation to promptly file a registration statement and use its best efforts to cause the registration statement to become effective arose out of the October 10, 1967 agreement whereby Diners' acquired Fugazy Travel Bureau from plaintiffs.

Plaintiffs owned outright and beneficially Fugazy Travel Bureau (Tr. W. Fugazy 72-73 [A997-A998]). On June 21, 1967, A. Mitchell Liftig, acting on behalf of Diners', approached William Fugazy, president of Fugazy Travel, concerning a possible acquisition of Fugazy Travel Bureau by Diners' (Tr. W. Fugazy 77-80 [A1002-A1005]). Two days later, on June 23, 1967, Marx, chairman of the board of Fugazy Travel Bureau, and Liftig met to discuss a possible

acquisition (Tr. W. Fugazy 80-81 [A1005-A1006]; Marx 651 [A1226]). Liftig stated that Diners' was a revitalized company because Continental was backing Diners' with a great deal of capital and had taken a specific interest in Diners' (Tr. W. Fugazy 84-85 [A1009-A1010]; Marx 656-58 [A1231-A1233]). Liftig further stated that Continental was "now about to take over [Diners']" (Tr. W. Fugazy 85 [A1010]). Liftig informed Marx and William Fugazy that Bloomingdale and Herd, Continental's chairman of the board and chief executive officer, wanted to make a quick deal with Fugazy Travel Bureau (Tr. W. Fugazy 85-86 [A1010-A1011]).

In July 1967, William Fugazy flew to Los Angeles to meet again with Liftig and with Bloomingdale (Tr. W. Fugazy 86 [A1011]). On the plane, William Fugazy happened to sit next to Jules Asch, Diners' financial vice president (Tr. W. Fugazy 89 [A1014]; Marx 663 [A1238]). Asch, like Liftig, informed Fugazy about the changes in Diners', especially Continental's involvement, and that Continental was going to take over Diners' (Tr. W. Fugazy 90 [A1015]).

William Fugazy met with Bloomingdale in Los Angeles and Bloomingdale confirmed that Diners' was a new company as a result of Continental's involvement (Tr. W. Fugazy 91 [1016]). Bloomingdale also stated that Continental had given Diners' an "open-ended checkbook" to acquire a company in the travel business in order to compete with American Express which had both a big travel and credit card business. Since Diners' did not have its own travel bureau, it was being "killed" by American Express in negotiations with the major airlines and hotels (Tr. W. Fugazy 91-92 [A1016-A1017]). William Fugazy told Bloomingdale that Marx was not disposed to sell to Diners' because Marx did not feel Diners' was a strong enough company to provide Fugazy Travel Bureau with the requisite capital for growth (Tr. W. Fugazy 91-92 [A1016-A1017]). Bloomingdale responded that Continental, then a 20% shareholder of Diners', would acquire all of Diners' stock" very shortly," that Marx and William Fugazy would be convinced that Diners' was the company "to come with," and that, as a result of Continental's position in Diners', he was not concerned about the price that he would have to pay to acquire Fugazy Travel Bureau (Tr. W. Fugazy 92-93 [A1017-A1018]). William Fugazy related his conversation with Bloomingdale to Marx (Tr. W. Fugazy 93 [A1018]; Marx 661-62 [A1236-A1237]).

On Sunday, July 16, 1967, Bloomingdale and William Fugazy again met, at the request of Bloomingdale, who was anxious to shore up a deal with Fugazy Travel Bureau. William Fugazy told Bloomingdale that a deal could not be consummated unless Marx was assured that Continental was going to take over Diners'. Bloomingdale responded that he would handle Marx and would take Marx and William Fugazy to meet Herd and Johnson, the Continental officers on the Diners' board. Bloomingdale stated that as far as he was concerned "the deal is done" (Tr. W. Fugazy 93-95 [A1018-A1020]).

Monday morning, July 17, 1967, Bloomingdale, Liftig, Marx and Tom Hayes, Diners' chief financial officer, met to discuss the acquisition. Marx again stated that he had to be assured that Continental would acquire Diners' and Bloomingdale assured Marx that the takeover would occur (Tr. W. Fugazy 95-96 [A1020-A1021]; Marx 664-65 [A1239-A1240]). Bloomingdale even went so far as to represent that he and Herd had discussed an exchange price of \$45 per share (Tr. Marx 665, 804 [A1240, A1303]). The meetings in July 1967 resulted in the execution of a letter of intent between plaintiffs and Diners' for the acquisition (P. Exh. 4 [A508]).

Immediately after the signing of the letter of intent, Bloomingdale got William Fugazy involved with certain projects at Diners' and Bloomingdale and William Fugazy met in Los Angeles on August 5, 1967. Again, William Fugazy expressed Marx's concern with the Continental

takeover and again assurances were made (Tr. W. Fugazy 107-08 [A1032-A1033]).

Four or five days later, on August 9 or 10, 1967, William Fugazy had a dinner meeting with David Mahoney, chief executive officer of Norton Simon and a director of Diners'. Mahoney represented that Continental would take over Diners' and attempted to persuade William Fugazy that the acquisition would be beneficial to all parties involved (Tr. W. Fugazy 108-09 [A1033-A1034]).

Then towards the end of August, Marx, Liftig and Bloomingdale visited William Fugazy at his home for dinner. On the way there, Bloomingdale was even more emphatic that a takeover would occur (Tr. Marx 665-66 [A1240-A1241]). After dinner, Bloomingdale told William Fugazy that Marx would be satisfied about the Continental acquisition so that the Fugazy Travel Bureau/Diners' acquisition could go forward (Tr. W. Fugazy 110-11 [A1035-A1036]).

In October 1967, Bloomingdale again represented that the takeover of Diners' by Continental was imminent. This was in an automobile trip from Summit, New Jersey to New York. That representation was made to both William Fugazy and Louis Fugazy (Tr. L. Fugazy 604-05 [A1204-A1205]).

William Fugazy finally did meet with Herd, Continental's board chairman, and Johnson, Continental's vice president, sometime in late September or early October 1967. William Fugazy expressed Marx's concern that Continental would acquire Diners' and William Fugazy asked specifically whether Continental was going to acquire the remainder of Diners' stock. Herd's response was: "Well, you don't court a girl unless you are going to marry her" (Tr. W. Fugazy 112-15 [A1037-A1040]).* After the meeting with Herd and

^{*}The marriage finally took place—albeit $2\frac{1}{2}$ years after the acquisition. The marriage was conditioned on the withdrawal of the registration statement, which was accomplished by the unilateral act of Diners' over plaintiffs' protest (Tr. Marx 875 [A1322]; P. Exh. 43 [A784]).

Johnson, Bloomingdale and William Fugazy shared a taxicab and Bloomingdale inquired whether William Fugazy was happy with Herd's assurances of a Continental takeover and asked whether William Fugazy would relate the meeting to Marx (Tr. W. Fugazy 118 [A1043]). William Fugazy did indeed relate the conversation to Marx (Tr. W. Fugazy 119, 496-97 [A1044, A1174-A1175]).* Marx was finally convinced that Continental would take over Diners' and the closing for the acquisition of Fugazy Travel Bureau by Diners' occurred on October 30, 1967 (P. Exh. 5 [A513]; Tr. W. Fugazy 129 [A1054]).

C. Defendants' Counterclaims—Travelco

Pursuant to Section 4.6 of the acquisition agreement, plaintiffs Marx, William Fugazy and Louis Fugazy agreed that "at or prior to the time of the Closing, [they shall] have divested themselves of, and shall have caused all members of their respective families to divest themselves of, any interest that any of the foregoing may have had, directly or indirectly, in any Franchise, in Travelco, Inc. (Pa.) and in Travelco, Inc. (N.Y.)" (P. Exh. 5 at §4.6 [A542-A543]). Plaintiffs complied with that provision.

By affidavits sworn to October 30, 1969, plaintiffs Marx, William Fugazy and Louis Fugazy stated that they had divested themselves of any interest, direct or indirect, in Travelco (D. Exh. EEE [A863]). In fact, neither Marx nor his stepson John Summerlin ever had any interest whatsoever in Travelco (Tr. W. Fugazy 1520 [A1447]).

The sole shareholder of Travelco was Irwin Fruchtman. Well prior to the Diners' acquisition, the Fugazys and Fruchtman agreed to indemnify Fruchtman on the Franklin National Bank loan to Travelco, which Fruchtman had guaranteed (D. Exh. FFF [A864]). The purpose of the indemnity, executed prior to divestment, was to reassure Frucht-

^{*}Marx in turn related the information about a Commental takeover to his stepson, plaintiff John Summerlin (Tr. Summerlin 557-58 [A1184-A1185]).

man, a novice in the travel field, that the loan to Franklin National Bank would be repaid. The loan was paid off in six or seven months and plaintiffs were never liable on their indemnity to Fruchtman (Tr. W. Fugazy 1528 [A1455]; Marx 1453 [A1421]). Any profits generated to Travelco were to inure to Travelco's benefit or to the benefit of its sole shareholder, Irwin Fruchtman (Tr. Marx 1472 [A1434]). All the plaintiffs eventually joined in the indemnity, not for any benefit or interest they could gain, but in order to share the responsibility assumed initially by only William and Louis Fugazy (Tr. Marx [A1430]).

Fugazy Travel Bureau had a management services contract with Travelco, which was fully disclosed to Diners' and which became an asset of Diners' (D. Exh. XX at exh. C [A841]). In addition, Travelco's appointments in the International Association of Travel Agents ("IATA"), as with all other franchises, were carried in the name of Fugazy Travel Bureau, requiring that Fugazy Travel Bureau's management team be represented in an executive capacity in Travelco (Tr. Phillips 1291-92, 1302 [A1411-A1412, A1415]; W. Fugazy 1522-23 [A1449-A1450]). Accordingly, William and Louis Fugazy served as officers and directors of Travelco after the acquisition in compliance with the management services contract and the IATA appointments. After Diners' acquired Fugazy Travel Bureau, the appointments remained in Fugazy Travel Bureau's name, so that Fugazy Travel Bureau's representation in the franchises had to continue (Tr. Phillips 1301-03 [A1414-A1416]).

Finally, the Travelco transaction was fully disclosed in the schedules to the acquisition agreement (P. Exh. 6 at Schedules 4, 6 [A574, A592-A595]).

ARGUMENT

POINT I

The Evidence Fully Supports The Jury's Verdict That Diners' Breached Its Contractual Obligations

The standard to be applied in determining whether the Trial Court committed reversible error in denying defendants' motions for a directed verdict and for judgment notwithstanding the verdict is well-settled:

"In determining whether the motions for a directed verdict and a judgment n.o.v. were properly denied, this court must 'view the evidence in the light most favorable to [the party other than the movant] and give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn Taking that view of the evidence, we must then decide whether or not 'reasonable men' could return a verdict for the plaintiffs" Fortunato v. Ford Motor Co., 464 F.2d 962, 965 (2d Cir.), cert. denied, 409 U.S. 1038 (1972).

A jury verdict will not be set aside "unless, when viewing the evidence in the light most favorable to the prevailing party, there is a complete absence of probative facts to support the conclusion reached by the jury." Collins v. Penn Central Trans. Co., 497 F.2d 1296, 1297 (2d Cir. 1974).

Defendants' appeal from the jury's verdict with respect to plaintiffs' breach of contract claim is built on unsupported inferences and distortions of both the testimony and documentary evidence. The evidence presented at trial and the reasonable inferences which must be drawn in favor of plaintiffs fully support the jury's verdict and the Trial Court's denial of defendants' post-trial motion.

A. Diners' Did Not Promptly File A Registration Statement And Did Not Its "Best Efforts" To Cause The Registration Statement To Become Effective

Section 10.2(b) explicitly obligated Diners', upon notification by plaintiffs, "to promptly file* a registration statement and use its best efforts to cause the registration statement to become effective." Pursuant to the contract, plaintiffs notified Diners' on April 16, 1969 that they were requesting Diners' to file a registration statement (P. Exh. 27 [A661]; Tr. Marx 700 [A1250]; Summerlin 559-61 [A1186-A1188]; L. Fugazy 615-16, 636 [A1206-A1207, A1216]; W. Fugazy 202-04 [A1073-A1075]).

The uncontroverted evidence demonstrated that, upon receipt of plaintiffs' request for registration, Diners' did not proceed promptly to prepare and file the registration statement. Instead, Diners' president, George Faunce, wrote to J. Victor Herd, chairman of the board of Continental and a director of Diners', and Harold Johnson, executive vice president of Continental and a director of Diners', to determine what action should be taken:

"Harold—Alfred [Bloomingdale, Diners' board chairman] asked me to send this to you and Herd. He wants to know your position—George." (P. Exh. 27 [A661]).

Johnson's unequivocal "do nothing" response of April 24, 1969 exemplifies the attitude Diners' assumed, and thereafter maintained, toward plaintiffs' registration request:

"The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.

^{*&}quot;Promptly," has been construed to mean without unreasonable delay in a securities law context. Salinger v. Ling-Temco-Voight, Inc., 324 F. Supp. 1006, 1008 (W.D. Pa. 1971); Harrison v. Lehigh Press, Inc., Sec. Reg. No. 345 at A14-A16 (Phila. Common Pleas March 16, 1976). See Naftalin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 496 F.2d 1166 (8th Cir. 1972).

"To my way of thinking there is nothing that needs to be done at the present time. Mr. Bloomingdale may discuss this at a later date but my reaction is to do nothing." (P. Exh. 29 [A665]) (emphasis added).

Diners', in fact, "did nothing to register the stock until late July 1969, more than three months after receiving the letter requesting registration and almost two months after its financial statement for the fiscal year ended March 31, 1969 became available" (R. 145 at 5 [A407-A408]; Tr. Asch 1167-70 [A1387-A1390]).

On the basis of this undisputed evidence, the Trial Court properly concluded that "the jury could reasonably infer that Diners', with the urging and approval of Herd and Johnson, decided to do nothing and thereby avoid its obligations under paragraph 10.2(b) of the agreement" (R. 145 at 5 [A408]).

It was the opinion of plaintiffs' expert witness, Stanley Friedman, that had Diners' complied with its contractual obligation to promptly file the registration statement, Diners' should have filed the registration statement by June 20, 1969—approximately two weeks after its audited financial statements for the fiscal year ended March 31, 1969, became available (P. Exh. 31 [A729]; Tr. Friedman 1732-35 [A1509-A1512]). It was Friedman's further opinion that had Diners' complied with its contractual obligation to use its "best efforts" to cause the registration statement to become effective, the registration statement should have become effective, in the normal course of events, approximately 70 days after June 20, or the end of August 1969 (Tr. Friedman 1790-91 [A1571-A1572]). In fact, it was Friedman's expert opinion that 70 days was a "rather generous" figure in Diners' case since Diners' was a reporting company, required to make regular filings with the SEC* (Tr. Friedman 1793 [A1574]).

^{*}This expert testimony is consistent with this Court's decision in Republic Technology Fund, Inc. v. Lionel Corp., 345 F. Supp. 656 (S.D.N.Y. 1972), rev'd in part, 483 F.2d 540, 552 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974), where, in reversing the trial court, this

Moreover, the record is replete with evidence from which the jury could reasonably conclude that Diners' game-plan was to delay and avoid registering plaintiffs' restricted shares by every means it could conjure up.* Diners' cajoled and urged both Marx and William Fugazy to agree not to go forward with the registration process—prior to plaintiffs' formal reguest for registration, prior to Diners' delayed filing of the registration statement, and prior to Diners' unilateral withdrawal of the registration statement over plaintiffs' objections (Tr. Marx 872-75A [A1319-A1323]; F. Fugazy 304-13 [A1109-A1118]; see "Counterstatement of the Facts" at 11-14). There is no question that Diners' was concerned about disclosing the deficiencies of its operation in a registration statement and the "very deleterious effect" that such disclosure would have on its earnings (Tr. Marx 872-75A [A1319-A1323]; W. Fugazy 304-13 [A1109-A1118]).

Although plaintiffs were willing and offered to pay Diners' in advance one-half of the cost of the registration and to furnish Diners' with an indemnity as provided in the agreement (P. Exh. 27 [A661]), Diners' maneuvered these conditions to delay the registration. (See Point I B, *infra*). Diners' never specified any amount allegedly representing

Court took cognizance of expert testimony to the effect that six to eight weeks was all that should have been necessary to effectuate the registration statement. Moreover, in Kupferman v. Consolidated Research & Mfg. Corp., [1961-64 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91, 197 (S.D.N.Y. 1962), the District Court squarely held that six weeks was adequate for the preparation and filing of a post-effective amendment and that the filing should have become effective in an additional six weeks. See Harrison v. Lehigh Press, Inc., Sec. Reg. L. Rep. No. 345 at A14-A16 (Phila. Common Pleas March 16, 1976).

^{*}Diners' contention that it was excused from promptly filing the registration statement while it was pursuing "alternatives" to registration with plaintiffs is refuted by the express language of Section 10.2(b) (Defendants' brief at 12-13, 46-47). By the terms of the agreement Diners' only could obtain an opinion from its counsel that registration was not required or obtain a "no-action" letter from the SEC. Diners' did neither.

one-half of the cost of registration until July 15, 1969 (D. Exh. PPP [A879]) and thereafter intentionally manipulated the amounts as a ruse to avoid registration (P. Exh. 55 [A799]; D. Exh. QQQ [A881-A883]; see "Counterstatement of the Facts" at 12-14). Diners' did not even raise the indemnity, which plaintiffs offered to provide from the outset, until four months after plaintiffs' request for registration (D. Exhs. SSS [A885]; TTT [A886]; VVV [A888]). From these facts alone the Trial Court determined that "the jury could have reasonably concluded that Diners' acted in bad faith...in order to avoid its obligation to file a registration statement" (R. 145 at 6 [A410]).

Diners' contention that it exercised its best efforts but was hindered by internal problems is merely a last-ditch effort to quarrel with the Trial Court's instructions to the jury and the adverse jury determination (Defendants' brief at 67-68).*

With respect to Diners' "best efforts" obligation the Trial Court instructed the jury without objection by andants:

"Under the law, Diners' 'best efforts' obligation required Diners' to do everything that would reasonably have to be done to cause the registration statement to become effective so that in the normal course of events,

^{*}The Trial Court instructed the jury that, in determining whether Dine at had promptly filed and used its best efforts to cause the registration statement to become effective, the jury could consider Diners' contentions: 1) that the parties were discussing "alternatives" to registration; 2) that Diners' had the right to, and did, include other securities in the registration statement; 3) that plaintiffs were supposed to pay in advance one-half of the costs of registration and furnish an indemnity agreement; 4) that comments from the SEC were not received until approximately two months after the registration statement was filed and that Diners' thereafter responded by letter and attended a meeting with the SEC; and 5) that William Fugazy testified that there were "monumental problems involved in causing the registration statement to become effective" (Tr. 1960-62 [A1635-A1637]). Diners' raised no objection to these instructions and the jury found in favor of plaintiffs.

Diners' best efforts would result in the registration statement becoming effective. Diners' best efforts obligation was not limited by circumstances or factors within its control, but rather was limited only by external causes over which Diners' would have had no control." (Tr. 1959 [A1634]).*

Accordingly, Diners', in order to meet its best efforts obligation, was required to file with the SEC a registration statement which complied with the disclosure and other requirements of the securities laws and to do everything that reasonably had to be done to cause the registration statement to become effective. Boruski v. Division of Corp. Finance of U.S. Sec. and Ex. Com'n, 321 F. Supp. 1273 (S.D. N.Y. 1971); Kupferman v. Consolidated Research & Mfa. Corp., [1961-64 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91, 197 (S.D.N.Y. 1962). When Diners' finally filed a registration statement on August 28, 1969-some four months after plaintiffs requested registration—that registration statement did not comply with the securities laws (P. Exhs. 30 [A666]; 39 [A773]). Diners' never amended the registration statement so that it could become effective. Instead, Diners', on its own initiative, withdrew the registration statement over plaintiffs' protest (R. 145 at 5 [A409]: P. Exhs. 41, 42 [A781, A783]; Tr. Marx 701 [A1251]).

^{*}The Court's charge, to which Diners' raised no objection, is in complete accord with the case law. Republic Technology Fund, Inc. v. Lionel Corp., 345 F. Supp. 656 (S.D.N.Y. 1972), rev'd in part, 483 F.2d 540 (2d Cir. 1973). cert. denied, 415 U.S. 918 (1974); Waste Mgm't, Inc. v. Deffinbaugh, CCH Fed. Sec. L. Rep. ¶ 95,531 (8th Cir. 1973); see Robert L. Ferman & Co. v. General Magnaplate Corp., 33 F.R.D. 326 (D.N.J. 1963); In the Matter of Pathe Indus., Investment Company Act Release No. 7054 (April 13, 1972).

B. The Evidence Fully Supports The Trial Court's Finding That Diners' Acted In Bad Faith, Thereby Hindering Performance Of The Reimbursement And Indemnity Provisions Of The Contract

Diners' contends, as it argued to the Trial Court, that its duty to promptly file a registration statement was conditioned upon plaintiffs' paying, in advance, one-half of the costs of registration and furnishing Diners' with an indemnity agreements (Defendant's brief at 41-42). Diners' also contends that the jury could not reasonably conclude, as the Trial Court found, that Diners' hindered or prevented performance of the conditions (Defendants' brief at 42-45; R. 145 at 5-6 [A409-A410]).

Diners' contentions are totally unfounded; there was more than sufficient evidence in the record for the jury to conclude that Diners' utilized the conditions precedent as a ruse to avoid its obligation to promptly file a registration statement.

The record clearly evidences that plaintiffs were prepared and offered to comply with the conditions precedent. In their April 16, 1969 letter requesting registration, plaintiffs stated:

"In connection with such registration, the undersigned are prepared and hereby offer to advance to you an amount sufficient to reimburse you for one-half of all registration fees and expenses as provided in said paragraph 10.2(b), and to furnish the indemnity agreement referred to therein." (P. Exh. 27 [A661]).

Diners' characteristically "did nothing." It did not determine and request plaintiffs to tender a specific amount allegedly representing one-half of the costs of the registration until well after June 20, 1969 (D. Exh. PPP [A879]). When, on July 15, 1969, it finally established and requested a specific amount, the jury reasonably could have concluded that the sum demanded "was considerably in excess of the reasonable expenses to be incurred" (R. 145 at 6 [A410]) and there-

after that Diners' continued to manipulate the reimbursement provision (P. Exh. 55 [A799]; D. Exh. QQQ [A881]).

Because of Diners' inability to accurately determine the costs of registration, the parties agreed that Marx personally would guarantee payment and that Diners' would be reimbursed for one-half of the registration expenses "after the registration statement is effective within 30 days after [receipt] of the itemized bills by both parties" (D. Exhs. P RRR [A818]; [A884]). Diners' agreed to furnish plaintiffs with an accurate figure of the expenses incurred in connection with the registration statement so that plaintiffs could pay one-half. Marx's personal guarantee of all the expenses was later modified by a letter dated August 25, 1969 whereby Marx and William Fugazy together personally guaranteed that the registration expenses would be paid (D. Exh. WWW [A889]).*

Defendants' argument that plaintiffs were required to furnish an indemnity agreement as a condition precedent to Diners' obligation to promptly file the registration statement is also tainted by Diners' "do nothing" bad faith attitude and was likewise rejected by the jury and the Trial Court. Plaintiffs offered to provide the indemnity in their April 16, 1969 request for registration (P. Exh. 27 [A661]). However, Diners' did not get around to raising the indemnification question until late August 1969 (D. Exhs. SSS

^{*}Defendants contend that Exhibit WWW represents an accord between the parties and that Diners' obligation thereafter was merely to file a registration statement (Defendants' brief at 38-40). This affirmative defense was not presented at trial and was rejected by the Trial Court (R. 145 at 7 [A411]; see Point I C, infra). As Friedman testified, the reimbursement provision of the contract was inartfully drawn since it called for plaintiffs to reimburse Diners' in advance for expenses that could not be determined in advance (Tr. Friedman 1749-49A, 1762-66 [A1527-A1528, A1541-A1545]). It is clear from Exhibits RRR, UUU, P and WWW that the parties recognized this fact [A884, A887, A818, A889]. Exhibit WWW simply represents an attempt to remedy the draftsmanship problem and is not an "accord" as erroneously contended by defendants.

[A885]; TTT [A886]; VVV [A888]), long after the registration statement should have been filed.*

It is well-settled, as the Trial Court emphasized in its opinion, "that a perty cannot insist upon a condition precedent when he himself has caused its non-performance." Wagner v. Derecktor, 306 N.Y. 386, 118 N.E.2d 570 (1954); Grad v. Roberts, 14 N.Y.2d 70, 75, 248 N.Y.S.2d 633, 197 N.E.2d 26 (1964); Hevliger v. Tune-Time Fashions, Inc., 39 App. Div. 2d 698, 332 N.Y.S.2d 253 (1st Dep't 1972). It is an equally well-settled rule in New York that:

"The obligation to use good faith in carrying out what is written underlies all written agreements. Every contract implies good faith and fair dealing between the parties to it. Thus, in every contract there exists an implied covenant of good faith and fair dealing. It is implied that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. ***In every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part. It is likewise implied in every contract that there is a duty of cooperation on the part of both parties. Thus, whenever the cooperation of the promissee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given." "Rochester Park, Inc. v. City of Rochester, 38 Misc. 2d 714, 718, 238 N.Y.S.2d 822, 827 (Sup. Ct. Monroe Co.), aff'd, 19 App.

^{*}The fact that plaintiffs did not furnish an indemnity agreement until requested by Diners' does not excuse Diners' admitted failure to promptly prepare and file the registration statement. In the opinion of plaintiffs' expert witness, Diners' should have begun preparing the registration statement when it received plaintiffs' request in April 1969. The indemnity agreement could then be obtained prior to the actual filing or prior to the effective date of the registration (Tr. Friedman 1732-35, 1777-81 [A1509-A1512, A1557-A1561]).

Div. 2d 776, 241 N.Y.S.2d 763 (4th Dep't 1963), quoting 10 N.Y. Jur. § 203.

Accordingly, Diners' owed plaintiffs an affirmative duty of fair dealing and good faith cooperation in connection with plaintiffs' performance of the reimbursement and indemnity provisions. Diners' allegedly "passive behavior," after plaintiffs specifically offered to pay one-half of the expenses and provide the indemnity agreement, constituted a breach of that duty. The evidence established Diners' intent to put the registration statement on the back-burner and, therefore, the jury reasonably could conclude that Diners' utilized the conditions precedent as another of its tactics to avoid its contractual obligation to register plaintiffs' shares.

C. Since The Alleged Affirmative Defense Of Accord Was Never Tried By Express Or Implied Consent Of The Parties, The Trial Court Properly Rejected It After Trial And Verdict

For the first time in its post-trial motion, Diners' attempted to assert an alleged "accord" between the parties as an absolute defense to plaintiffs' breach of contract claim. The Trial Court properly rejected "Diners' attempt to assert this affirmative defense after trial" (R. 145 at 7 [A411]).

^{*}Diners' cites Rosenberg v. Refco Facilities Corp., 59 Misc. 2d 25, 297 N.Y.S.2d 1021, 1022-23 (Civ. Ct. N.Y. Co. 1969) and Marine Trust Co. v. Gilfillan, 258 App. Div. 296, 17 N.Y.S.2d 107, 108 (4th Dep't 1939) for the proposition that passive acquiescence to the nonperformance of a condition precedent does not, ir and of itself, constitute hindrance. Diners' also cites Wetherell v. Laskey, 286 App. Div. 533, 145 N.Y.S.2d 624 (4th Dep't 1955) for the sweeping proposition that it had no duty to demand performance of the conditions precedent (Defendants' brief at 43, 45-46). Each of these cases is readily distinguishable. The courts found in both Rosenberg and Marine Trust that the alleged breaching party did not actively hinder performance of the contract by not securing performance of a condition precedent by a third party over whom he could exert no control. Here, no third party was involved and Diners' affirmatively sought to delay the registration. In Wetherell, performance of the condition precedent was solely within the power of one party and he made no attempt whatsoever to comply. Here, plaintiffs were prepared and offered to comply with the conditions precedent and were prevented by Diners' bad faith delaying tactics.

Diners' now contends that the Trial Court committed reversible error by not applying Rule 15(b) of the Federal Rules of Civil Procedure to allow Diners' to amend its pleadings after trial and after the jury verdict to assert an unpleaded affirmative defense which was not tried by the parties and was not submitted to the jury for its consideration.*

Diners' now asserts that the mere introduction of Exhibit WWW, the August 25, 1969 letter by which Marx and William Fugazy personally guaranteed payment of the costs of registration, "clearly raised the issue of accord during trial;" that, "in its motion for a directed verdict at the end of the presentation of its case, Diners' raised the accord as a defense;" and that the "Court itself recognized the accord argument". Diners' furthermore argues that "while [it] claims that it was error to submit this issue to the jury... there can be no question that it was tried" (Defendants' brief at 37).

^{*}Diners' complains in a footnote that the Trial Court deemed plaintiffs' pleadings amended after trial to include a claim for breach of contract under New York law and that its refusal "to apply Rule 15(b) to Diners' 'accord' defense is inconsistent and especially improper.'' (Defendants' brief at 37) As the Trial Court noted, "from the outset of the trial plaintiffs contended that Diners' breached the October 10, 1967 agreement both in the failure to promptly file a registration statement and the failure to use its best efforts to cause the registration statement, ultimately filed, to become effective.'' Therefore, the Court concluded that, "in light of the numerous instances throughout the trial in which the contract claim was outlined by the plaintiffs and the Court, and Diners' agreement to the form of the special verdict submitted to the jury," Diners' argument was an afterthought (R. 145 at i-ii, footnote 2 [A417-A418]). Unlike plaintiffs, Diners' never outlined or presented its "accord" defense at trial.

^{**}Since Diners' never raised the alleged affirmative defense of accord at trial, this issue was not submitted to the jury. This is apparent from the record and the Court's instructions to the jury, to which defendants raised no objection. (Tr. 1961-63 [A1636-A1638]). Due to its delay in putting forward this theory of accord, Diners' argues that the Trial Court's failure to entertain this theory after verdict constituted an erroneous determination of law. However, if this issue had been timely presented at trial, evidence could

Nothing could be further from the truth. The record at trial, including the Trial Court's instructions to the jury, to which Diners' raised no objection, demonstrates that the unpleaded issue of accord was not tried by the express or implied consent of the parties.

Rule 15(b) of the Federal Rules of Civil Procedure provides in pertinent part:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues...." (emphasis added).

Accordingly, Rule 15(b) cannot be invoked unless the unpleaded issue has been "tried by express or implied consent of the parties." The determination as to whether the issue has been so tried rests in the sound discretion of the Trial Court* and its decision will not be overturned except upon a clear showing of abuse of that discretion. Marcris v.

have been adduced which would have made the existence of an accord a question of fact for the jury on which Diners' would have had the ultimate burden of proof. There is no doubt that evidence of the parties' "intent" would have been presented and the jury would have had to determine if the parties, in fact, intended to enter into an accord. In rejecting Diners' belated argument, the Trial Court implicitly found, as the Fifth Circuit did in Bettes v. Stonewall Ins. Co., 480 F. 2d 92, 94 (5th Cir. 1973), that a party will not be allowed to wait "until after the trial and receipt of evidence, argument, and charge to the jury before raising an issue not found in the pleadings nor included in the pre-trial order and then raise it when it is too late for [the other party] to do anything about it."

*The authority which Diners' erroneously cites for its assertion that the application of Rule 15(b) was "mandatory" under the circumstances of this case is clearly inapposite (Defendants' brief at 37). In Securities and Exchange Com'n v. Rapp, 304 F.2d 786, 790 (2d Cir. 1962); this Court deemed the pleadings amended because

Sociedad Maritina San Nicolas, S.A., 245 F.2d 708 (2d Cir.), cert. denied, 355 U.S. 922 (1957); Gallen v. Lloyd-Thomas Co., 264 F.2d 821 (8th Cir. 1959); 6 Wright & Miller, Federal Practice and Procedure § 1493 at 469 (1971).

It is undisputed that the affirmative defense of accord was neither pleaded in accordance with Rule 8(c) of the Federal Rules of Civil Procedure nor tried by the express consent of the parties (R. 145 [A403]). Diners' therefore must be contending that it was tried by implied consent of the parties.

But the mere introduction of Exhibit WWW did not, as Diners' asserts, raise the issue of accord at trial. As the Sixth Circuit stated in *MBI Motor Co.* v. *Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974):

"[T]he implication of Rule 15(b)... is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue. See Bettes v. Stonewall Ins. Co., 480 F.2d 92 (5th Cir. 1973); Standard Title Ins. Co. v. Roberts, 349 F.2d 613, 620 (8th Cir. 1965); Niedland v. United States, 338 F.2d 254, 258 (3rd Cir. 1964)."

At no time during the trial did Diners' raise the theory of accord as a defense*; at no time before the jury rendered

the unpleaded issue had clearly been tried by the parties. Here it is clear from the record that the theory of accord was not put forward by Diners' during the trial; that it was not included by Diners' in its Request to Charge (R. 118 [A85-A98]); and that it was omitted from the Trial Court's instructions to the jury without objection by Diners' (Tr. 1958-63, 1984-85 [A1633-A1638, A1659-A1660]). The Court, in its sound discretion, determined that the issue had not been tried and that Rule 15(b) was inapplicable.

^{*}In support of its assertion that this theory was raised by defendants' counsel during argument at the close of defendants' case,

its verdict was the Trial Court or plaintiffs' counsel apprised that evidence aimed at this unpleaded issue had been introduced.

Rather, Exhibit WWW was presented without eliciting testimony relating to any accord and was understood by counsel and the Court as relating generally to Diners' contention that plaintiffs had failed to comply with certain alleged conditions precedent. Accordingly, Defendants' Request to Charge is devoid of any reference to "accord" as a defense (R. 118 [A85-A98]). Of utmost significance is the fact that the Trial Court did not instruct the jury regarding the now-proposed theory of accord as a bar to plaintiffs' breach of contract claim (Tr. 1958-63 [A1633-A1638]). Diners' raised no objection to the charge as given and therefore waived this alleged affirmative defense.* Bettes v. Stonewall Ins. Co., 480 F.2d 92 (5th Cir. 1973).

The Third Circuit in Systems, Inc. v. Bridge Electronics Co., 335 F.2d 465, 467 (3d Cir. 1964), similarly rejected an attempt to assert an affirmative defense after trial and adverse verdict:

"The pertinent instructions of the court, to which no objections were taken, related solely to the issue as defined by the pretrial order. It is of further significance that of nine written requests to charge submitted by the defendant, none referred to the issue it raises here for

Diners' points to pages 1824-25 of the trial transcript ([A1598-A1599]; Defendants' brief at 37). No mention of "accord" is made there. Moreover, it is clear that both counsel and the Court were directing their remarks to Diners' conditions precedent argument.

^{*}Diners' contentions regarding the alleged accord again boil down to an unregistered objection to the Court's instructions to the jury. The Court specifically charged the jury on defendants' conditions precedent argument (Tr. 1961-63 [A1633-A1638]). Diners' raised no objection to this charge as required by Rule 51 and accordingly could not resurrect such an objection on a motion for judgment notwithstanding the verdict or on appeal. Jennings v. Boenning & Co., 338 F. Supp. 1294, 1303-04 (E.D. Pa. 1975); see Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir.), cert. denied, 414 U.S. 857 (1973).

the first time. We find nothing in the record from which it can be inferred that the parties regarded the issue as one then being tried. It appears that the contention now raised is an afterthought prompted by the inability of the defendant to find reversible error in the record of the case as tried."

In any event, there was ample evidence in the record for the jury to conclude that Diners' had manipulated the payment and indemnity conditions in an attempt to drag out the registration process. Diners' alleged "accord" (D. Exh. WWW) reasonably could be, and apparently was, interpreted as further evidence of plaintiffs' continuing good faith efforts to comply with Section 10.2(b) and to bring about the filing of the registration statement.

Based upon all the evidence presented, the jury reasonably could find, as the Trial Court concluded, that Diners' had long since breached its obligation to promptly file the registration statement and use its best efforts to cause the registration statement to become effective.

Even then Diners' failed to fully perform its agreement* since, on its own initiative, it withdrew the registration statement in February 1970 over plaintiffs' objection (P. Exhs. 41, 42 [A781, A783]; Tr. Marx 701, 875-75A [A1251, A1322-A1323]).

^{*}It is clear from Exhibits RRR, UUU, P and WWW (A884, A887, A818, A889) that the parties intended that Marx's and William Fugazy's guarantee would only be enforceable if and when the registration statement became effective. Of course, testimony on this issue would have been introduced if Diners' had, in fact, raised the issue of accord during the trial. Nevertheless, the record refutes Diners' unsupported contention that the alleged "accord was fully executed by Diners', since Diners' never caused the registration statement to become effective (Defendants' brief at 40; P. Exh. 41 [A781]). Accordingly, the authority cited by Diners' supports plaintiffs. Plaintiffs would be able to recover on the underlying agreement in any event because Diners' breached the alleged executory "accord" (Defendants' brief at 40).

D. The Testimony By Plaintiffs' Expert Was Proper

Defendants argue that the Trial Court committed reversible error with respect to the testimony of Stanley Friedman because Friedman allegedly: (1) was a surprise witness; (2) was an improper rebuttal witness; and (3) testified about matters beyond his expertise (Defendants' brief at 63-67). The facts belie these arguments.

1. Surprise

One week prior to trial, plaintiffs' counsel informed defendants' counsel that he was considering calling an expert witness to testify with respect to plaintiffs' breach of contract claim. Defendants' counsel stated that he would not object to the calling of an expert and that he would appreciate being advised as soon as the name of the expert and the areas of his testimony were determined (R. 137 at Exh. A, ¶¶ 3, 4 [A329]).

Early in the trial, in an informal bench conference, plaintiff advised the Trial Court and defendants' counsel that Friedman had been contacted and that plaintiffs' counsel thought he might be called to testify on plaintiffs' rebuttal case (R. 145 at ii [A418]; R. 137 at Exh. A, § 5 [A330]).

At this bench conference, defendants objected to plaintiffs' calling an expert witness not listed in the pretrial order. The Trial Court overruled defendants' objection and directed plaintiffs' counsel to advise defendants, as soon as a determination was made, of the name of the expert and the subject matter of his testimony (R. 145 at ii [A418]; R. 137 at Exh. A, § 6 [A330]).

It was not until May 16, 1975 that plaintiffs' retained Friedman, after defendants had offered testimony in defense to plaintiffs' breach of contract claim, which demonstrated to plaintiffs that rebuttal testimony was desirable (R. 137 at Exh. B [A335]). On that day, in accordance with the Trial Court's instructions, plaintiffs informed defendants' counsel that Friedman would be called to testify on

"the registration requirements of the [SEC] as they relate to plaintiffs' claim that the defendants failed to promptly file and to use best efforts to make effective a Registration Statement covering the restricted shares of Diners' Club stock held by plaintiffs" (R. 134 at Exh. A [A296]).*

These exact arguments of surprise were made in defendants' post-trial motion and specifically addressed and rejected by the Trial Court:

"First, defendants contend that Friedman was a surprise witness and that they were, therefore, unable to prepare for his cross-examination. This contention is without merit. It was within the Court's discretion to permit Friedman to testify and the fact that he was not listed in the pre-trial order, standing alone, does not warrant a new trial. See Stewart v. Meyers, 353 F.2d 691 (7th Cir. 1965). Plaintiffs' counsel supplied defendants with Friedman's name and the subject on which he would testify as an expert witness one week before he was called to testify. Within that week there were two full weekdays, in addition to the weekend, during which no proceedings were had in the trial. There was, thus, sufficient notice to defendants to enable them to prepare for Friedman's testimony. Moreover, at no time did defendants' counsel request a continuance to prepare for cross-examination or to obtain their own expert. In light of all the facts and circumstances, no substantial injustice resulted from permitting Friedman to testify." (R. 145 at 8-9 [A412-A413]).

2. Rebuttal

Defendants state that they had no inkling that plaintiffs were claiming that Diners' failed to promptly file the regis-

^{*}Defendants butcher this letter in their "statement of the facts" by conveniently omitting that portion which states that Friedman would testify concerning plaintiffs' claim that Diners' failed to promptly file the registration statement (Defendants' brief at 21).

tration statement until Friedman testified on rebuttal,* and that Friedman's testimony belonged as part of plaintiffs' case-in-chief.

With respect to their first argument, defendants fail to point out that plaintiffs' trial memorandum, handed up to the Trial Court before trial commenced and served upon defendants at that time, set forth in detail plaintiffs' claim that defendants did not promptly file the registration statement and use their efforts to cause it to become effective (R. 126 at 14-16, 33-40 [A112-A114, A131-A138]). That claim was outlined to the jury in plaintiffs' opening (Tr. 27-30 [A959-A961]) and responded to by defendants in their opening (Tr. 55 [A986]). Moreover, as part of their casein-chief, plaintiffs submitted more than enough evidence to support their entire breach of contract claim (P. Exhs. 5 [A513]; 28 [A663]; 29 [A665]; 30 [A666]; 31 [A729]; 39 [A773]; 41 [A781]; 42 [A783]). In addition, defendants' own witnesses supported plaintiffs' claim. Jules Asch, Diners' officer in charge of preparing the narrative portion of the registration statement, admitted that he did not begin his work until late July 1969, three and one-half months after the request for registration (Tr. Asch 1167-70 [A1387-A13901).

The Trial Court, as with all other makeshift arguments of defendants, dismissed out-of-hand defendants' entire rebuttal argument:

"Defendants next contend that although it may have been proper for Friedman to testify on plaintiffs' direct

^{*}In its opinion, the Trial Court found that plaintiffs presented their promptly file claim from the outset of the trial:

[&]quot;[Diners'] contends that the claim did not take the form in which it was submitted to the jury until plaintiffs presented their rebuttal evidence. In fact, from the outset of the trial plaintiffs contended that Diners breached the October 10, 1967 agreement both in the failure to promptly file a registration statement and the failure to cause the registration statement, ultimately filed, to become effective." (R. 145 at i-ii [A417-A418]).

case, it was error to permit him to testify on rebuttal. It was within the discretion of the Court to permit expert testimony on rebuttal. See Sanchez v. Safeway Stores, Inc., 451 F.2d 998 (10th Cir. 1971); Casey v. Seas Shipping Co., 178 F.2d 360 (2d Cir. 1949). Diners' defense to plaintiffs' contract claim was that it had no duty to file the registration statement until August and that its duty was fully discharged by the actions taken. Mr. Friedman gave his opinion, in rebuttal, that a registration statement should have been filed by June 20, 1969 and become effective by the end of August, 1969. Accordingly, it was not error to permit him to testify on rebuttal." (R. 145 at 9 [A413]).

Defendants take exception to the cases cited by the Trial Court in its opinion. Sanchez v. Safeway Stores, Inc., 451 F.2d 998 (10th Cir. 1971) (Defendants' brief at 64-65), despite defendants' protestations to the contrary, fully supports the proposition that the trial court has wide discretion to allow rebuttal testimony. The court in Sanchez stated:

"The broad discretion of the trial judge in the admission or exclusion of expert evidence will be sustained unless manifestly erroneous It is within the discretion of the trial court to refuse or permit expert testimony on rebuttal." 451 F.2d at 1000.

Defendants lamely seek to distinguish away Casey v. Seas Shipping Co., 178 F. 2d 360 (2d Cir. 1949) (Defendants' brief at 65). This Court in Casey stated:

"The point as to the reception of evidence relates to the action of the court in permitting the introduction by appellee during his rebuttal of three depositions which it is admitted would have been properly received had they been offered by him while presenting his evidence in chief. This is a rather technical objection which, in the absence of surprise, of which none appears, deserves little notice. Assuming, without deciding, that the evidence was not admissible in rebuttal as of right, it might of course have been excluded But whether to do that or to permit its introduction out of order is a matter of discretion . . . and no abuse of that has been shown." 178 F.2d at 362.*

3. Scope of Friedman's Testimony

The record clearly establishes that Friedman was questioned on matters of contract interpretation on cross-examination only (Tr. Friedman 1760-69 [A1539-A1548]);** plaintiffs on direct sought his expertise only in the field of securities regulation.

On direct examination, Friedman, qualified as an expert on securities regulation, was asked his opinion as to when a registration statement should have been filed to be in compliance with plaintiffs' demand for registration. Friedman responded that the registration statement should have been filed two weeks after June 6, 1969—the date Diners' 1969 audited financial statements were available (Tr. Friedman 1731-32 [A1508-A1509]). Friedman was then asked and

^{*}In their brief, defendants string cite three cases as support for their argument that Friedman was an improper rebuttal witness: F. W. Woolworth Co. v. Contemporary Arts, 193 F. 2d 162 (1st Cir. 1951), aff'd, 344 U.S. 228 (1952); Skogen v. Dow Chemicals Co., 375 F. 2d 692 (8th Cir. 1967); McVey v. Phillips Petroleum Co., 288 F. 2d 53 (5th Cir. 1961) (Defendants' brief at 64). Each of these cases, however, fully supports the proposition that the allowance of such testimony is within the trial judge's discretion because he is the one most able to determine the desirability of such testimony versus any prejudice to the opposing party. Appellate courts are loath to interfere with the trial court on such matters. The Fifth Circuit in Skogen stated:

[&]quot;Allowance of a party to present additional evidence on rebuttal depends upon the circumstances of the case and rests within the discretion of the individual most able to weigh the competing circumstances, the trial judge." 375 F. 2d at 705.

^{**}Since any testimony by Friedman on contract interpretation was elicited by defendants on cross-examination, defendants' argument that Friedman testified in violation of the parol evidence rule does not hold water (See Defendants' brief at 52-54).

gave the basis for his opinion, referring to the documents already marked into evidence (Tr. Friedman 1732 [A1509]).

Defendants argue that somehow this constitutes testimony on contract interpretation (Defendants' brief at 49). Surely, an expert can give the basis for his opinion and refer to the documents that he relies upon in reaching that opinion. Rule 702 of the Federal Rules of Evidence provides that an expert may testify in the form of an opinion and Rule 703 goes on to provide that an expert's opinion may be based on "facts or data . . . made known to him at or before the hearing." Such facts or data may be data provided to the expert outside of court. Advisory Committee's Note on Rule 703, 3 Weinstein, Evidence 703-1 (1975). Each of defendants' objections to Friedman's testimony is in fact an objection to Friedman giving his opinion or the basis for that opinion, which, as the Trial Court time and again reminded defendants' counsel, an expert is permitted to do (Tr. Friedman 1732, 1736 [A1509, A1513]).

The Trial Court has wide discretion in allowing expert testimony. In *Krizak* v. W. C. Brooks & Sons, Inc., 320 F.2d 37, 42 (4th Cir. 1963), the court stated:

"The qualifications of experts and the extent to which they may be permitted to testify is largely left to the discretion of the trial court.... Whether, in any given case, the expert testimony is necessary to aid the jury in its search for the truth depends upon such a variety of factors readily apparent only to the trial judge that we must depend heavily upon his judgment."

And in *Bridger* v. *Union Ry.*, 355 F.2d 382, 387 (6th Cir. 1966), the court stated:

"We state preliminarily that a trial judge is vested with a wide discretion in determining whether or not expert testimony is admissible.... The trial judge's discretion is necessarily broad for he sits in the arena of litigation. He knows from the pleadings the conten-

tions of the parties, the direction which the case will take, and from his experience can predict, as the evidence unfolds before him, the problems with which the jury must wrestle."

Significantly, although defendants attack Friedman's testimony on several grounds, they conveniently omit critical facts concerning his testimony: first, they did not seek an adjournment to prepare for Friedman's cross-examination, nor did they offer their own expert, facts noted by the Trial Court in its opinion (R. 145 at 9 [A413]); second, defendants, in their alleged unprepared state, were able to muster several hours of cross-examination of Friedman, which consumed 49 pages of trial transcript (Tr. 1748-97 [A1526-A1578]); and third, the Trial Court cautioned the jury on the weight to be given Friedman's testimony:

"Ladies and gentlemen, that means that this witness can be asked his opinion. You are to give his opinion such weight as you deem appropriate. That may be a great deal of weight, it may be moderate weight, it may be little weight, or no weight at all." (Tr. 1726 [A1503])

Under the circumstances, defendants are hardly in a position to complain of Friedman's testimony.

E. The Trial Court Properly Took Judicial Notice Of The 36th Annual Report Of The SEC

As they did in their post-trial motion, defendants argue that the Trial Court committed reversible error in taking judicial notice of the 36th Annual Report of the SEC, which set forth the median time in 1970 between filing and the effective date of a registration statement. Defendants omnisciently assert that the jury understood the seventy day figure to be the authoritative standard. Defendants, however, fail to point out the Trial Court's careful charge to the jury on the seventy day figure:

"Plaintiffs contend that if Diners' had used its best efforts to cause the registration statement to become effective, the registration statement would have become effective approximately 70 days from its filing. The Court has taken judicial notice of the 36th Annual Report of the Securities and Exchange Commission which states that the average time between filing of a registration statement and the effective date during the fiscal year ended June 30, 1970 was 70 days. The taking of judicial notice by the Court of a fact is a finding that said fact is not subject to any reasonable dispute. However, whether or not the Diners' registration statement would have become effective within the average time, that is, 70 days, is a question for you to determine from all of the evidence in this case." (Tr. 1960 [A1635]).

Defendants did not object to this charge and pursuant to Rule 51 of the Federal Rules of Civil Procedure, they do not have standing to object at this late date. In any event, Friedman testified that the seventy day figure was "rather generous" (Tr. Friedman 1793 [A1574]).

The Trial Court disposed of this argument in its opinion, stating:

"Nor was it prejudicial error to allow Friedman, an expert witness, to give his opinion as to when the registration statement should have been filed or the time within which the registration statement should have become effective or to allow him to testify in reliance on the 1970 SEC Annual Report. The admission of Friedman's expert testimony, subject to the limiting instructions given at trial, was a proper exercise of the trial court's discretionary power over the progress of the trial. *United States* v. *Cohen*, Dkt. Nos. 74-2026-2027-2065 (2d Cir. June 26, 1975)." (R. 145 at 9-10 [A413-A414]).*

^{*}Defendants attempt to distinguish away the *Cohen* case cited by the Trial Court. *Cohen* both stands for the proposition that a trial judge has wide discretion in determining the admissibility of evidence and demonstrates that an appellate court is loathe to tamper with a jury verdict. In contrast, the case principally relied upon by

POINT II

The Evidence Fully Supports The Jury's Verdict In Plaintiffs' Favor On Defendants' Counterclaim

A. Travelco

For the third time, defendants make the identical unsubstantiated allegations concerning the Travelco transaction. Both the jury and the Trial Court considered the very same arguments that defendants now raise on appeal and found that defendants did not carry their burden of persuasion (R. 145 at 10-11 [A414-A415]).

The Trial Court specifically charged the jury regarding the Travelco transaction, without objection by defendants:

"If you find that the plaintiffs maintained a direct or indirect interest in the franchise at 342 Madison Avenue during the time that they were officers and/or directors of Diners', or any of its subsidiaries.., you may return a verdict for the defendants against the plaintiff who you find to have breached his fiduciary duties on this claim." (Tr. 1973 [A1648]).

The jury found that plaintiffs did not retain any interest in Travelco and there is sound support for its verdict in the evidence presented at trial.

William Fugazy testified that he no longer owned an interest in Travelco as of October 30, 1967 (Tr. W. Fugazy

defendants to demonstrate the alleged prejudicial error in taking judicial notice of the SEC Annual Report is totally inapposite. The Court in Apicella v. McNeil Indus., Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (Defendants' brief at 60) denied a pretrial motion for disclosure of the name of the person who prepared a medical article and those physicians who participated in its preparation on the ground that a newsreporter's sources are privileged and on the ground that the disclosure would act to deter other physicians from participating in the preparation of medical articles. The Court, however, stated that the article was relevant and would have allowed discovery concerning the article except for the journalist's claim of privilege. 66 F.R.D. at 82. On this basis, since one side would have an unfair advantage at trial, the Court precluded its introduction at trial.

1551 [A1463]). Similarly, by affidavits executed on October 29, 1967, Marx, William Fugazy and Louis Fugazy attested that they had divested themselves of any interest, direct or indirect, in Travelco (D. Exh. EEE [A863]). Marx and Summerlin never had any interest, direct or indirect, in Travelco (Tr. W. Fugazy 1520 [A1447]). Moreover, as the Trial Court stated, "the evidence introduced by plaintiffs tended to establish that the terms of the Travelco transaction were disclosed to defendants" (R. 145 at 11 [A415]).

Yet defendants persistently maintain that the indemnity agreement between plaintiffs and Irwin Fruchtman, Travelco's sole shareholder, constituted an ownership interest in Travelco by plaintiffs. The evidence, however, does not support their contention. Prior to Diners' acquisition, William and Louis Fugazy and Irwin Fruchtman entered into an indemnity agreement whereby the Fugazys agreed to indemnify Fruchtman in the event that Fruchtman was held liable on a loan which he had personally guaranteed from the Franklin National Bank to Travelco. The purpose of the indemnity, executed prior to divestment, was to reassure Fruchtman, a novice in the travel field, that the loan to Franklin National Bank would be repaid. Any profits from the travel business belonged solely to Travelco and Fruchtman, the sole shareholders (Tr. Marx 1472 [A1434]). The loan, in fact, was paid off in six or seven months (Tr. W. Fugazy 1528 [A1455]). All the plaintiffs eventually joined in this indemnity, not for any benefit or interest they could gain but, as Mr. Marx testified, in order to share the responsibility assumed initially by only William and Louis Fugazy (Tr. Marx 1468 [A1430]).

Contained in the August 1, 1967 agreement between the Fugazys and Fruchtman is an option provision stating that once the loan to Franklin National Bank was repaid, William and Louis Fugazy could, if they chose, acquire a percentage of the shares of Travelco. Paragraph 4 of the August 1, 1967 agreement states:

"At such time as the Corporation's loan of \$99,000.00 has been repaid in full to the Franklin National Bank. William and Louis shall have the option, exercisable upon written notice to Fruchtman, to purchase from Fruchtman for a total consideration of \$1.00, such number of shares of the stock of the Corporation owned by Fruchtman so that upon completion of the purchase William and Louis will each own thirty per cent (30%) of the outstanding stock of the Corporation and Fruchtman will own forty per cent (40%) thereof. Upon receipt of written notice from William and Louis of the exercise of such option. Fruchtman will promptly deliver to William and Louis certificates for the appropriate number of shares of stock of the Corporation for transfer on the books of the Corporation." (D. Exh. FFF [A865-A866]) (emphasis added).

Defendants seek to persuade this Court, as they unsuccessfully tried to persuade the jury and the Trial Court, that this option also constituted an ownership interest in Travelco on the part of plaintiffs (Defendants' brief at 72). The uncontroverted testimony and affidavits of William and Louis Fugazy (D. Exh. EEE [A863]) established that they had divested themselves of any ownership interest in Travelco prior to October 30, 1967. Moreover, contrary to defendants' insinuations, not an iota of evidence was introduced showing that William or Louis Fugazy exercised this option to purchase.

The issue of whether William and Louis Fugazy maintained an interest in Travelco after the acquisition was a question of fact for the jury's determination. "The jury chose to believe plaintiffs" (R. 145 at 11 [A415]).

B. Defendants' Evidentiary Objections

1. The Tower Complaint

Defendants sought to introduce into evidence a complaint in an action entitled Fugazy Travel Bureau, Inc. v. Tower

Credit Corp., (S.D.N.Y. 65 Civ. 2152) (D. Exh. L [A923]). That action is totally unrelated to the instant action. It involves totally different parties and involves a totally different transaction.

The relevance of Exhibit L and the prejudicial effect of the admission of that document were argued before the Trial Court. The Trial Court ruled that the prejudicial effect of Exhibit L outweighted its probative value, stating:

"THE COURT: It has been represented to the Court that the lawsuit set forth in the complaint marked Defendants' Exhibit L for the identification, was settled and discontinued.

"Under the circumstances, I am not prepared to receive the unsworn complaint which we have here. By saying that this in some way goes to Mr. Fugazy's character, it would seem to me that the prejudicial effect of this unsworn complaint outweights it probative value." (Tr. Marx 1495 [A1440]).*

Defendants suggest in their brief as they did at trial that Marx was the plaintiff in the *Tower* lawsuit and that William Fugazy was a defendant charged with fraud by Marx. Marx and William Fugazy were not parties to that lawsuit and nowhere in the complaint are any allegations made against William Fugazy. In fact, neither William Fugazy's name, nor Otto Marx's name, even appears in the complaint.

As the Trial Court found, the prejudicial effect to plaintiffs if Exhibit L were admitted into evidence would have been severe. Exhibit L is an unverified complaint, signed only by an attorney, and not by a party, in an action settled in its earliest stages, concerning the 1962 financial statements of an unrelated party, thirteen years prior to trial and

^{*}That the *Tower* lawsuit was irrelevant to the issues in the instant case was fully argued before the Trial Court. In fact, plaintiffs served and filed a twenty-one page brief and an exhibit book dealing with the admissibility of this exhibit, as well as certain other exhibits introduced by defendants (R. 127 [A145-A231]).

five years prior to the acquisition of Fugazy Travel Bureau by Diners' (R. 127 at 1-7 [A146-A152]). The allegations in the complaint are unsupported by any further proceedings in the case, not even deposition testimony. Under such circumstances, it was a proper exercise of judicial discretion to exclude Exhibit L. See Fed. R. Evid. 403.

Defendants argue that the *Tower* suit should have been disclosed to them prior to the Fugazy Travel Buteau acquisition (Defendants' brief at 74-75). Defendants obviously know that the *Tower* action was not disclosed to them only because it had been settled by the time of the acquisition of Fugazy Travel Bureau by Diners'. It was not a pending action which had to be disclosed in the schedules to the acquisition agreement for the sale of Fugazy Travel Bureau to Diners'.* In accordance with the acquisition agreement, all pending actions were disclosed in schedule 9 to the acquisition agreement (P. Exh. 6 at Schedule 9 [A601]).

2. Pierbusseti

Defendants also take exception to the exclusion of Exhibit H, an alleged offer to sell Fugazy Travel Bureau to Pierbusseti. On three occasions during trial, defendants offered Exhibit H into evidence, through William Fugazy (Tr. W. Fugazy 385 [A1139]), through Summerlin (Tr. Summerlin 595 [A1202]) and through Anthony Piscatella, defendants' first witness (Tr. Piscatella 964-65 [A1361-A1362]). Each time, the Trial Court denied its admission.

William Fugazy had never seen Exhibit H prior to the commencement of trial (Tr. W. Fugazy 381-82 [A1135-A1136]). Similarly, Summerlin could not positively identify the document (Tr. Summerlin 594-95 [A1201-A1202]). Under such circumstances, it was clearly proper for the Trial Court to deny its admission through these witnesses.

As for Piscatella, the negotiations for the sale of Fugazy Travel Bureau to Pierbusseti are totally irrelevant to this

^{*}Defendants admit in their brief that the *Tower* suit was settled (Defendants' brief at 74).

case. Those negotiations occurred 1½ years prior to the Diners' acquisition and were broken off in their earliest stages. Exhibit H, in fact, was simply a "trial balloon," which went nowhere (Tr. Marx 739-40 [A1268-A1269]). In contrast, the acquisition of Fugazy Travel Bureau by Diners' was a separate and distinct transaction, negotiated over several months, resulting in an executed contract.

3. Piscatella's Testimony

Finally, defendants argue that it was prejudicial error to exclude Piscatella's testimony concerning alleged discussions with William Fugazy about the franchise concept. This argument appears as a one-page afterthought at the conclusion of defendants' brief (Defendants' brief at 78). This argument, as with all other contrived arguments of defendants, can be summarily dismissed. The Trial Court did permit Piscatella to testify as to what was said at meetings with William Fugazy. However, the Trial Court properly refused to permit Piscatella to give his self-serving opinion and impressions about the franchising concept. Moreover, defendants' offer of proof was defective in that it failed to give the substance of William Fugazy's alleged statements concerning the franchising concept and thus is inadequate for appellate review (Tr. Piscatella 961-62 [A1358-A1359]).

POINT III

The Trial Court Improperly Directed A Verdict In Defendants' Favor On Plaintiffs' First Claim, Fraud In The Acquisition

At the conclusion of plaintiffs' case-in-chief, the Trial Court directed a verdict in defendants' favor on plaintiffs' first claim, fraud in the acquisition, holding that plaintiffs failed to make out a *prima facie* case that there were material misrepresentations concerning the timing of the Continental takeover that plaintiffs relied upon in agreeing to the acquisition of Fugazy Travel Bureau by Diners'.

A review of the trial transcript clearly demonstrates that repeated representations that Continental would take over Diners' were made to Marx and William Fugazy, acting on behalf of the principals of Fugazy Travel Bureau, throughout the summer and early fall of 1967, by numerous officers and directors of Diners' and Continental, including the chief executive officer and chairman of the board of each company (Tr. W. Fugazy 77-81, 84-86, 89-96, 107-19 [A1002-A1006, A1009-A1011, A1032-A1044]; Marx 656-58, 661-62, 664-66 [A1231-A1233, A1236-A1237, A1239-A1241]; see Counterstatement of the Facts at 15-19).

Time and again defendants were told that Marx would not agree to the acquisition unless and until he could be assured that the Continental takeover would occur. Marx's unequivocal position prompted Bloomingdale to arrange a meeting with J. Victor Herd, Continental's chief executive officer and chairman of the board. In response to William Fugazy's pointblank question at that meeting concerning the alleged Continental takeover, Herd stated: "Well, you don't court a girl unless you are going to marry her" (Tr. W. Fugazy 112-15 [A1037-A1040]). This representation by Herd was related to Marx by William Fugazy. Marx, based on Bloomingdale's and Herd's representations concerning the takeover, finally agreed to the acquisition, which took place on October 10, 1967 (Tr. W. Fugazy 118-19, 129, 496 [A1043-A1044, A1054, A1174]; P. Exh. 5 [A513]).

Specific representations concerning the timing of the Continental takeover were made by defendants throughout the negotations for the acquisition of Fugazy Travel Bureau. Plaintiffs' first meetings concerning an acquisition were with Diners' agent, A. Mitchell Liftig, who represented that Continental was "now about to take over [Diners']" (Tr. W. Fugazy 85 [A1010]). Plaintiffs then entered into negotiations directly with Diners' and were courted by Diners' chief executive officer who represented that Continental would acquire all of Diners' Stock "very shortly" (Tr. W. Fugazy 92-93 [A1017-A1018]). William Fugazy re-

lated his conversation with Diners' chief executive officer to Marx (Tr. W. Fugazy 93 [A1018]; Marx 661-62 [A1236-A1237]). And in October 1967, at or about the time of the closing, Bloomingdale represented to both William Fugazy and Louis Fugazy that the takeover was imminent (Tr. L. Fugazy 604-05 [A1204-A1205]).

Thus, the Trial Court was in error in directing a verdict against plaintiffs on their first claim.

Conclusion

Based on the foregoing, it is respectfully submitted that the judgment in favor of plaintiffs with respect to plaintiffs' breach of contract claim and defendants' counterclaims should be affirmed and that the judgment in favor of defendants on plaintiffs' claim of fraud in the acquisition should be reversed.

June 18, 1976

Respectively submitted,

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AFTERNOON SESSION

1:55 p.m.

(In open court; jury present.)

THE COURT: It is the custom in this court that the juror seated in seat No. 1, in this case Mrs. Alma S. Roman, will serve as the foreman, or in this case forelady, or, if you prefer, the foreperson of the jury.

Her function will be to take the vote, and in the event the jury requires anything, to write out the requriements in the form of a note and to send the note out to me. I will then review the note, confer with counsel, and we will try to respond to your request, whatever it may be, as promptly as possible.

In this case -- and I will refer to it more

later -- I have determined that it would be best that you

be furnished with a verdict form. The form contains

six questions which I have prepared and reviewed with

counsel. You will note that the form is set forth in

a way that you will proceed from question to question,

following the instructions that are contained in the form,

and answering those questions you deem appropriate.

The form will be handed out to both Mrs. Roman and to counsel

-- although I believe they have it now -- at the conclusion

of my charge.

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Madam Forelady, Mr. Hladik, and ladies of the jury:

We come now to that portion of the trial where
you are instructed on the law applicable to the case and then
retire for your final deliberations. You have heard all
of the evidence introduced by both sides and through arguments
of their respective attorneys you have learned the conclusions which each party believes should be drawn from the
evidence presented to you.

As the jurors, it is your fundamental duty to determine from all the evidence that you have heard, and the exhibits that have been admitted, what the facts are. You are the sole, the exclusive, judges of the facts.

In that field you are supreme, and neither I nor anyone else, including counsel, may invade your province.

On the facts it is your recollection which governs. It governs over what counsel may recall to be the facts, and in the event you disagree amongst yourselves, you are free to request that particular portions of the testimony, particular exhibits, be presented back to you. The testimony would be read here in the courtroom; the exhibits would be sent to the jury room upon your request.

-- -- On the other hand; and with equal emphasis,

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I charge you that you are bound to accept the law of the case
as it is given to you in this charge, and in any instructions
that I have given to you during the course of the trial.

Whether you agree with the law as given to you by the Court
or not, you are bound by it.

The process by which you arrive at a verdict is first to determine from all the evidence and the exhibits what the facts are; and, second, to apply the law of the case as I give it to you to the facts as you have determined them to be. The conclusion thus reached will be your verdict.

I have endeavored to preside impartially and not to express an opinion one way or the other as to what you should find the facts to be.

In the course of the trial, it has been necessary for me to rule on the admission of evidence and on motions made with respect to the applicable law. You must not infer from any of my rulings or from anything I have said during the course of the trial that I hold any views for or against any of the parties to this lawsuit. Any views of mine would in any event be totally irrelevant since it is your recollection of the evidence and your determination of the issues of fact which control.

At times during the trial I have sustained ob-

 to answer, and, on occasion, where an answer was made, instructed that the answer be stricken from the record and be disregarded. You may not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I have excluded from your consideration were excluded because they were not legally admissible. Arguments or contentions of counsel are, as I have said on occasion, not evidence and you must consider only the evidence.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts. One is direct evidence such as the testimony of an eye witness, the testimony of a person who was a participant in a conversation. The other, indirect or circumstantial evidence, the proof of circumstances from which the existence of certain facts may or may not be inferred. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordanœwith the preponderance of all the evidence in the case, both direct and circumstantial.

In making the factual determination on which
your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony
of the witnesses as you have heard it in this courtroom,
or as there has been read to you testimony given on deposition.
Under our rules, an examination before trial or a deposition,
so-called, is taken under oath and is entitled to equal
consideration by you notwithstanding the fact that it was
taken prior to trial and outside the courtroom.

Stipulations or agreements of facts stated or concurred in by counsel for all parties are considered evidence in the case and stipulations or agreements of fact are to be accepted as true. The law does not, however, require youto accept all of the evidence I have admitted even though it may be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses and determine the degree of weight you choose to give to the witnesses' testimony.

The testimony of a witness may fail to conform
to the facts as they occurred because he intentionally is
telling a falsehood, because he did not accurately see or
hear that about which he testifies, because his recollection
of the event is faulty, or because he has not expressed himself

 clearly in giving his testimony. There is no magic formula by which one may evaluate testimony. You bring with you to this courtroom all the experience and the background of your own daily lives. In your everyday affairs, as you go about your business, you determine for yourselves the reliability or the unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests that you apply in your deliberations. I frequently say to jurors that you bring your common sense to the courtroom. I expect you to take your common sense with you into the jury room for your deliberations, and I expect that when you come out of that jury room your common sense and your good conscience will accompany you.

The interest or lack of interest of any witness in the outcome of the case, the bias or the prejudice of the witness, if there be any, the appearance, the manner in which the witness gave his testimony on the stand, the opportunity that the witness had to observe or know the facts concerning which he testified, the probability or improbability of the witness' testimony when viewed in light of all of the evidence in the case, are all items to be taken into consideration in determining the weight, if any you will assign to that witness' testimony.

If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together.

If, however, that is not possible, you will then have to determine which of the conflicting versions you will accept.

If you find that any witness has wilfully testified falsely as to any material fact, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may, if you choose, accept so much of his testimony as you deem true and disregard what you feel is false.

By the processes which I have just described to you, you, as the sole judges of the facts, determine which of the witnesses you will believe, what portion of their testimony you accept, and what weight you will give to it.

The plaintiffs, Otto Marx, William D. Fugazy,
Louis V. Fugazy, and John Summerlin as well as officers and
employees of the corporate defendants, testified at this

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Each of them is what we call an interested witness. trial. They are a party to the lawsuit, or officers or employees of a party. That a witness is interested in the outcome of a case does not mean that he has not told the truth. It is for you to determine from his demeanor on the stand and such other tests as your experience dictates whether or not his interest is such that he is likely unintentionally or otherwise to color his testimony. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve the testimony of such a witness even though it is not otherwise impeached or contradicted. However, you are not required to disbelieve such a witness, and you may accept all or such part of his testimony as you deem reliable and reject such part as you deem unworthy of acceptance.

We have in the law what we call presumptions.

Presumptions are deductions or conclusions which the law requires the jury to make under certain circumstances in the absence of evidence or circumstances in the case which leads the jury to a different, contrary, conclusion.

A presumption continues to exist only so long as it is not overcome or outweighed by evidence or circumstances in the case to the contrary, but unless and until so outweighed the jury should find in accordance with the presumption.

 For example, it is presumed that private transactions have been fair and regular, that the ordinary course of business or employment has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life, and that the law has been obeyed.

During the trial you heard numerous references to Alfred Bloomingdale. Mr. Bloomingdale was not called as a witness. I charge you that if it is peculiarly within the power of either side to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party.

However, no such presumption should be drawn by you where the witness is equally available to both sides.

A witness known to be present in New York could have been subpoenaed by either side. Whether or not Mr. Bloomingdale was known by the plaintiffs to be in New York is a matter which I will leave to your recollection of the record.

Turning to the burden of proof, the burden of proof rests on the plaintiffs on their claims and on the defendants on their counterclaims. The "burden of proof" means burden of persuasion. The plaintiffs have the burden of proof on every essential element of their claims and

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the defendants have the burden of proof on every essential element of their counterclaims. That means that it must be established by a fair preponderance of the credible evidence that the claims that the plaintiffs make are true. The same burden is on the defendants with respect to their counterclaims.

The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and effect that it has on your minds.

The law requires that in order for a claimant to prevail, whether it be a plaintiff or a counterclaiming defendant, the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must resolve a particular question in favor of the other side, for then the claimant will not have carried the burden, the burden of proof, the fair preponderance of the burden of persuasion.

It is only if the evidence favoring a plaintiff's claim outweighs the evidence opposed to it that you could find in favor of the plaintiff. The same situation prevails with respect to a defendant's counterclaim.

If the proof should fail to establish by a preponderance of the evidence any essential element of a plaintiff's
claim against any defendant, you should find for that
defendant. Similarly, if the proof should fail to establish
by a preponderance of the evidence any essential element
of any defendant's counterclaim against any plaintiff,
you should find for that plaintiff on that counterclaim.

If in the course of your deliberations your recollection of any part of the testimony should fail, or you should find yourselves in doubt concerning my instructions to you on the law, it is your privilege, if you so desire, to send out a note and to request that you be permitted to return to the courtroom for the purpose of having such testimony or instructions read to you. As I have noted before, I will try to comply with your requests as promptly as possible.

The plaintiffs in the first claim, which you will consider, charge that the defendants violated the federal securities laws and regulations, and that they were damaged thereby. Section 10(b) of the Securities Exchange Act

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24 25 of 1934 provides "It shall be unlawful for any person, directly or indirectly, by the use of interstate means or of the mails, to employ any manipulative or deceptive device in connection with the purchase or sale of any security in contravention of rules promulgated by the Securities and Exchange Commission." The Securities and Exchange Commission promulgated Rule 10(b) 5 which makes it unlawful for any person, directly or indirectly, to employ any scheme to defraud, to make any statement to defraud, or to do any other act which defrauds a person in connection with the purchase or sale of any security by the use of interstate means or of the mails.

This case, as it is now submitted to you, arises out of the sale of the Fugazy Travel Bureau, Inc. to the Diners' Club, Inc. in 1967.

Plaintiffs William D. Fugazy, Louis V. Fugazy and Otto Marx, Jr. contend that the defendants represented that the Continental Insurance Company was going to take over the Diners' Club, Inc. in October or November, 1968 in order to induce them to enter into the September 27, 1968 agreement and thereby to agree to relinquish certain rights they had to cash compensation from the sale of franchises and other income under their October 10, 1967 cmployment agreements and to accept in place of these rights, consider-

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ation which included additional shares of Diners' common stock. They contend that the representations concerning the Continental takeover were false and that defendants knew that their representations created a false picture.

Plaintiffs week to recover damages allegedly sustained by them as a result of their relinquishment of their cash compensation for consideration which included restricted Diners' common stock.

In order for a plaintiff to recover damages for a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder, he must prove five elements.

First, he must show that the defendant made representations to him which were material.

Second, he must show that the representations were false.

Third, he must show that the defendant stated these representations with the intent to create a false picture for the plaintiff.

Fourth, plaintiff must show that he relied upon these misrepresentations.

Fifth, he must show that as a result he suffered monetary damages.

If you find that any plaintiff in this case has

established these five elements by a preponderance of the evidence, then your verdict will be for that plaintiff.

If you find that any of these five elements has not been established by a plaintiff, then your verdict will be for the defendants as to that plaintiff.

I will explain each of these elements to you in a moment.

Before doing so, however, I must inform you that

I made a decision after the close of plaintiffs' case concerning plaintiffs' claim that they were induced to sell

Fugazy Travel Bureau in October 1967 on the basis of representations concerning a Continental takeover by defendants.

I concluded, as a matter of law, that there was no reliance on the part of plaintiffs in October 1967 regarding the timing of the Diners' Club takeover by Continental and, further, that there were no material misrepresentations made by the defendants prior to October 10, 1967 as to the specific date or time when the Diners' Club takeover by Continental would take place.

As a result, I have concluded that the plaintiffs failed, as a matter of law, to prove at least one of the elements of an action for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder. Thus, it is no longer within your province as triers of the facts to render a decision on plaintiffs'

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Bureau in October, 1967.

I must impress upon you, however, that this

claim that they were defrauded into selling Fugazy Travel

I must impress upon you, however, that this decision on my part is to have no effect on your deliberations and your duty to render a fair and impartial decision on the claim of William D. Fugazy, Louis V. Fugazy, and Otto Marx, Jr., that in 1968 they were defrauded into relinquishing certain rights they had to cash compensation under their employment contracts for additional restricted shares of Diners' Club common stock. I have concluded that there are questions of fact concerning that claim that you, as the ultimate triers of the facts must decide.

I will therefore charge you on the elements of a claim for violation of Section 10(b) of the Securities Exchange Act of 1934 and rule 10(b)5 promulgated thereunder as these elements relate to the claims of Willaim D. Fugazy, Louis V. Fugazy, and Otto Marx, Jr. under their employment contracts.

The first question for you to answer is: What, if any, representations were made by the deendants individually or by others acting on their behalf to the plaintiffs? You must determine whether or not representations concerning the takeover of Diners Club by Continental were made to induce plaintiffs William D. Fugazy, Louis V. Fugazy, and Otto

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Marx, Jr., or any of them, to agree to relinquish their rights to cash compensation under their employment contracts. If you find that any defendant made representations to any plaintiff concerning a takeover of Diners'by Continental by November, 1968, you will next consider whether those representations were material. A material fact is one to which a reasonable man would attach importance in determining his choice of action in the transaction in question. That is, whether a reasonable person under similar circumstances would have considered the representations concerning the takeover of Diners' Club by Continental important in making an investment decision. If you find that none of the defendants made any representations concerning a Continental takeover of Diners'to any plaintiff, that the representations made were not material, your verdict will be for defendants. If, however, you find that any defendant, individually or acting with other defendants made representations concerning a Diners' takeover by Continental to any plaintiff and that such representations were material, you must next consider whether those representations were true or false. If you find that the representations concerning a Diners' takeover by Continental were true, your verdict will be for the defendants.

> SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. = 7914020

If, however, you find that the representations

pgbr 2 concerning a Diners' takeover by Continental made by any defendant to any plaintiff were false, then you must decide 3 whether or not that defendant made the representations with what is called under the law "scienter". If you find 5 that the defendant you are considering had knowledge of the 6 7 fact that the representations concerning the Continental 8 takeover of Diners' created a false picture, then you will 9 find that the defendant made the representations with scienter. It is not necessary, however, for you to find 10 that the defendant actually knew that the representations 11 12 concerning the Continental takeover were misleading or that the defendant actively intended to deceive or harm any 13 14 of the plaintiffs in this case. If you find that the defendant you are considering had knowledge of the fact 15 that the representations created a false picture, then you 16 17 18 19

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may find that the plaintiff to whom this representation was made has established his third required element for recovery under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder. If you determine that any defendant made a representation which was false and had knowledge of the fact that the representations created a false picture, you must determine whether the plaintiff you are considering relied among other representations upon the misrepresentations

concerning the takeover of Diners' Club by Continental in deciding to relinquish his rights to cash compensation for certain considerations which included additional shares of restricted Diners' Club common stock. In this connection you may wish to consider the background and experience of the plaintiffs, particularly Otto Marx, Jr.and William D. Fugazy.

You must next determine whether or not as a result of the misrepresentations made by any defendant, individually or acting with other defendants, any plaintiff was damaged. I will charge you now on the law of damages. Although the fact that I do so must not be taken as an intimation that you should find for the plaintiffs, or any of them. Whether a plaintiff is entitled to recover is for you, and you alone, to decide. If you find that a plaintiff is entitled to recover damages from a defendant, you are then to consider the amount of damages to be awarded to that plaintiff. The law requires that a plaintiff be compensated for his losses resulting from the violation by a defendant of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 promulgated thereunder.

In this type of claim a plaintiff can recover only the difference between the value of what he gave up and the

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value of what he received.

Plaintiffs allege that their damages are the difference between the value of their rights to cash compensation, which they gave up for restricted shares of Diners' Club common stock, and the price at which they ultimately sold the stock. Plaintiffs claim that they were damaged in the following amounts:

Otto Marx, Jr., \$651,805.

William and Louis Fugazy, \$325,885 each.

Defendants claim that the consideration received by plaintiffs included the cancellation of an indebtedness to Diners'in the amount of \$180,352, a release from certain tax liabilities, cash in the amount of approximately \$243,000 and a limitation on other liabilities, and that this exceeded the value of the rights to cash compensation from the sale of franchises and other income, pointing out that after September, 1968 only about 50 additional franchises were sold. Therefore, defendants contend that rather than being damaged plaintiffs profited from the September 1968 agreement.

If you find that the plaintiffs received less than they would have received had they not exchanged their rights to cash compensation for consideration which included additional restricted shares of Diners' common

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stock, the difference between the value of what plaintiffs gave up and the value of what they received would be their damages.

On the other hand, if you find that the plaintiffs received as much as or more than they would have received had they not exchanged their rights to cash compensation, and therefore that plaintiffs were not damaged, your verdict should be for defendants on plaintiffs' first claim.

I turn now to the plaintiffs' second claim.

Plaintiffs also contend that defendant Diners'
Club, Inc. breached paragraph 10.2(b) of the acquisition
agreement dated October 10, 1967 by failing to promptly
file a registration statement with the Securities and
Exchange Commission and by failing to use its best efforts
to cause the registration statement to become effective.

In order for plaintiffs to establish breach of contract, they must establish the following:

First, they must prove that there was an agreement.

Second, they must prove that there was consideration for the agreement.

Third, they must prove that there was a breach of a term of that agreement.

Fourth, they must prove that as a result of the

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I charge you as a matter of law that there was an agreement and that there was consideration for the agree-The questions, however, that you must determine as the trier of the facts are whether plaintiffs have proved by the preponderance of the evidence that Diners' failed to meet its obligations under Section 10.2(b) of the acquisition agreement and plaintiffs suffered monetary losses as a result of defendants' failure.

breach of the agreement they suffered monetary losses.

Section 10.2(b) of the acquisition agreement provides that the Diners' Club, Inc. would promptly file a registration statement after receipt of notice from plaintiffs that they desired that Diners' Club register their shares and would use its best efforts to cause the registration statement to become effective.

Plaintiffs contend that Diners' failed to promptly file a registration statement as required under the agreement between the parties and that defendant failed to use its best effort to cause such registration statement to become effective.

Plaintiffs contend that they requested registration on April 16th, 1969 and that Diners' Club did not file the registration statement until August 28, 1969.

Plaintiffs contend that defendant should have

filed the registration statement on or about June 20, 1969 after Diners' audited financial statements for the fiscal year ended March 31, 1969 were available for inclusion in the registration statement.

Defendant Diners' contends that it used its
best efforts to file and make effective the registration
statement notwithstanding plaintiffs' failure and refusal
to fulfil certain conditions precedent to such registration
rights.

You must determine whether, in fact, Diners' promptly filed a registration statement. They say that they did. Plaintiffs say that they didn't.

Under the law "promptly" means without unreasonable delay.

"best efforts." Under the law, Diners' "best efforts"
obligation required Diners' to do everything that would
reasonably have to be done to cause the registration statement to become effective so that in the normal course of
events, Diners' best efforts would result in the registration
statement becoming effective. Diners' best efforts
obligation was not limited by circumstances or factors
within its control, but rather was limited only by external
causes over which Diners' would have had no control.

 Plaintiffs contend that if Diners'had used its best efforts to cause the registration statement to become effective, the registration statement would have become effective approximately 70 days from its filing. The Court has taken judicial notice of the 36th Annual Report of the Securities and Exchange Commission which states that the average time between filing of a registration statement and the effective date duringthe fiscal year ended June 30, 1970 was 70 days. The taking of judicial notice by the Court of a fact is a finding that said fact is not subject to any reasonable dispute. However, whether or not the Diners' registration statement would have become effective within the average time, that is, 70 days, is a question for you to determine from all of the evidence in this case.

Diners' contends that the delay in registration was, in fact, caused by the plaintiffs. In this connection, you may wish to take into consideration that, although the plaintiffs formally requested the registration of those shares on April 16, 1969, the plaintiffs, during the next approximately six to eight weeks, advanced certain alternative proposals to avoid the necessity of filing a registration statement and that that may have resulted in a delay in the commencement of the preparation of the registration state-

ment. You may also take into consideration that defendant Diners had the right to, and did, include in the registration statement other securities and that, in that connection, it was required to obtain information with respect to the holders of those securities, which may have resulted in a delay in the filing of the registration statement.

Diners' contends that plaintiffs were required as a condition precedent to the preparation of that registration statement, to advance to defendant Diners' an amount sufficient to reimburse Diners' for one-half of the expenses of that registration statement, and that the plaintiffs never made any such payment.

Defendant Diners' also contends that, notwithstanding that plaintiffs were required as a condition precedent
to the preparation of that registration statement, to
execute an indemnity agreement, plaintiffs refused to
execute the indemnity agreement until August 24, 1969,
just four days before the actual filing.

In determining whether or not defendant Diners' used its best efforts to cause the registration statement to become effective, defendant urges that comments from the Securities and Exchange Commission with respect to the registration statement were not received by Diners' until

approximately two months after the registration statement had been fled and that within two weeks thereafter defendant Diners' had transmitted to the Securities and Exchange Commission two letters of response to those comments and had attended a conference with the staff of the Securities and Exchange Commission in Washington to resolve those comments.

Diners' also of points to the testimony of William D. Fugazy, that there were monumental problems involved in causing the registration statement to become effective.

If you find that Diners' failed to promptly file the registration statement as required, your verdict will be for plaintiffs on that question. If you find, however, that Diners' promptly filed the registration statement, you still must consider whether or not Diners' used its best efforts to cause the registration statement to become effective.

obligations to plaintiffs by failing to promptly file a registration statement or by failing to use its best efforts to cause the registration statement to become effective, then you must determine what damages, if any, plaintiffs have suffered as a result of the breach. Under the law of

damages for breach of contract, a breaching party is to compensate or to indemnify the injured party for the damages that he has suffered; that is, to put him in as good a position as he would have been had the breaching party abided by its agreement. Damages exclude all speculation and are limited to compensation.

It is up to you to determine when the registration statement should have been filed and when, with the use of best efforts, the registration statement should have become effective and thus what damages, if any, plaintiffs suffered.

plaintiffs' contend that Diners' should have filed the registration statement by June 20, 1969. As I have indicated they further contend that the registration statement should have become effective within 70 days from that date. Thus, plaintiffs contend that the registration statement should have become effective on August 29, 1969.

An exhibit in this case reflects that Diners' common stock closed on the New York Stock Exchange on that date at \$23.50 per share.

Since plaintiffs sought a registration of 66,158 shares they contend that they could be expected to have received \$23.50 per share in the public offering.

Otto Marx, Jr. was seeking to register 27,208 shares, for which he could have expected to have received \$639,388 in the public offering. This is, of course, his contention.

Instead, Mr. Marx sold 23,484 of those shares at \$13.50 per share and 3724 shares for \$15 per share for a total amount of \$372,894.

William and Louis Fugazy each sought registration of 16,539-1/2 shares. Thus, each of them could have expected to have received \$388,678.25 in the public offering. These shares were all sold at \$15 per share; William Fugazy received \$248,092.50 from these sales, as did Louis Fugazy.

Thus, plaintiffs contend that William Fugazy's.

loss from Diners' breach was \$140,585.75, as was Louis

Fugazy's, less their registration costs. John Summerlin sought registration of 5,871 shares, from which he could be expected to have received \$137,968.50 in the public offering.

He sold these shares at \$15 per share, for a total amount of \$88,065. Thus, plaintiffs contend that their losses were as follows: Otto Marx, Jr., \$266,494 William Fugazy, \$140,585.75; Louis Fugazy, \$140,585.75; and John Summerlin, \$49,000.50.

reach this point in your calculations, deduct the registration costs which would have been borne by these plaintiffs.

You can find for the plaintiffs both on their claim that they were defrauded into relinquishing their rights to cash compensation for restricted shares of Diners' Club common stock and on their claim that Diners' breached

its contractual obligations to promptly file a registration statement and to use its best efforts to cause a registration statement to become effective.

for recovery. However, in the event that you do find for plaintiffs on both claims, then plaintiffs' claim for breach of contract must be reduced by those shares which plaintiffs acquired in return for relinquishing their rights to cash compensation. Otherwise, plaintiffs would be recovering damages on both claims for the same shares.

Thus, Otto Marx, Jr. sought registration of 3,724 shares of Diners' stock that he acquired in return for relinquishing his rights to cash compensation.

Accordingly, if you find that defendants defrauded plaintiffs into relinquishing their cash compensation and Diners' failed to promptly file a registration statement and failed to use its best efforts to cause a registration statement to become effective, then plaintiffs of Otto Marx, Louis Fugazy and William Fugazy allege that their breach of contract claim would be as follows: Otto Marx, Jr., \$234,840; William Fugazy, \$124,767 and Louis Fugazy,

\$124,767.

Again, you should take into consideration and should deduct from any award of damages the cost of registration which the plaintiffs were obligated to pay under their agreement.

Since John Summerlin did not acquire any shares of Diners' Club common stock for relinquishment of cash compensation, his breach of contract claim would remain unaltered in the event you found for plaintiffs on both claims.

Diners' claims that it did not breach its contract, that it did, in fact, promptly file a registration statement, and that it did, in fact, use its best efforts to make the registration effective.

Diners' points to a number of exhibits, including correspondence between the parties, throughout the period from April, 1969 up through the fall and early winter of 1969, to support its allegations and defenses in connection with this claim.

Turning now to the defendants' counterclaims, the defendant Diners' Club claims that in connection with its acquisition of the Fugazy Travel Bureau in 1967 and the obligations undertaken in connection therewith, the plaintiffs made untrue statements of material facts,

omitted to state material facts, employed devices, scherand artifices to defraud, and engaged in acts, practices and a course of business which operated as a fraud and deceit upon Diners' Club.

In order for you to return a verdict for the defendant Diners' Club on this claim, you must find that the defendant has established by a fair preponderance of the evidence the five elements which I mentioned earlier when discussing plaintiffs' 10(b)(5) claim. The defendant must establish that the plaintiffs knowingly or in reckless disregard for the truth failed to disclose to Diners' any of the following facts:

- 1) That Fugazy Travel Bureau was insolvent and had been for the four years preceding the acquisition by Diners'; or,
- 2) Misrepresented to Diners' that the plaintiffs had entered into an arm's length transaction for the sale of the 342 Madison Avenue office, which included the principal portion of the New York City business, when the actual sale was to a company owned, operated and controlled by the plaintiffs, Travelco, which misrepresentation resulted in an overstatement of the net profits of Fugazy Travel Bureau in 1967 by approximately \$250,000; or that the franchise program formulated by them was

viable when the plaintiffs knew, from their own experiences, that the obligations of the franchisees were so burdensome that it was not possible for the franchise system to work, and, knowing this, the plaintiffs actually instituted a policy not to have the franchisees make the required payments in order to perpetuate the franchises until sale of Fugazy Travel Bureau could be effected, or that the liabilities stated in the financial statements certified by Messrs. Marx, William Fugazy and Robert Phillips were true and correct when they knew that the liabilities were understated and, therefore, the profits for the nine-month period ending June 30, 1967, were overstated by at least \$250,000.

- 3) A reasonable investor would attach importance to one or more of those misrepresentations and omissions in the circumstances in which they were made in determining whether or not to acquire Fugazy Travel Bureau and to undertake the obligations in connection therewith; and,
- 4) That a reasonable investor would attach importance to one or more of the omissions or misrepresentations, or that the plaintiffs engaged in a comprehensive scheme to defraud the defendants, or that Diners', in fact, relied on those misrepresentations in making its investment

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 decision, in order for Diners' to prevail.

Defendant Diners' urges that you take into consideration the evidence in this case concerning the condition of Fugazy Travel Bureau at the time it was sold to defendant Diners', the viability of the franchise program developed by the plaintiffs, and the interests of the plaintiffs in the office at 342 Madison Avenue.

If you find that no misrepresentations or omissions were made by the plaintiffs, or that such misrepresentations or omissions, if made, were reasonable when made, you may not return a verdict for the defendant.

Even if you find that those representations or omissions were knowingly and willfully made by plaintiffs to defendant, you may not return a verdict for the defendant unless you also find that a reasonable investor would attach importance to them in determining whether or not to acquire Fugazy Travel Bureau and to undertake the obligations in connection therewith.

Finally, even if you find that those statements were knowingly and willfully made by the plaintiffs to the defendant and that a reasonable investor would attach importance to them in making his decision, you may not return a verdict for the defendant, unless you also find that the plaintiffs engaged in a comprehensive scheme to defraud the

defendants, that a reasonable investor would attach importance to the omissions, or that this defendant, in fact, relied on the plaintiffs' misrepresentations.

If you find to your satisfaction that the defendant has established by a fair preponderance of the evidence all of the aforementioned elements of its claim, you must further find the extent to which the defendant was damaged, if at all. For this type of claim the defendant can recover the difference between the value of what it gave up and the value of what it received.

In determining the value of what the defendant gave up, you may take into consideration that the consideration transferred by the defendant Diners' to plaintiffs during the years 1967 and 1968 included approximately \$4,220,260 worth of the shares of the Diners' common stock at its then market value, and approximately \$2,500,000 in cash.

You may also take into consideration that in exchange for those securities and the cash, the defendant received Fugazy Travel Bureau, the franchise system to be operated by Fugazy Travel Bureau, and was obligated to and did employ the plaintiffs.

For this type of claim the defendant can also recover the direct consequential damages suffered by it

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as a result of the plaintiffs' violations.

In determining the direct consequential damages suffered by defendant Diners', you may take into consideration that it lost \$693,000 during the year ended March 31, 1969; \$14,437,000 during the year ended March 31, 1970; \$9,988,000 during the nine months ended December 31, 1970; and \$9,891,192 thereafter.

As to the defendants' second counterclaim against the plaintiffs, defendants Diners' and/or Diners'/Fugazy Travel claim that the plaintiffs breached the fiduciary duties owed to Diners' and/or Diners'/Fugazy Travel by the plaintiffs in their capacities as officers and directors of tapse companies.

A director or an officer of a corporation violates his duty of trust to that corporation if he does not give to that corporation his undivided and unqualified loyalty, if he allows his personal interests to conflict with the interests of the corporation, or if he uses for his personal gain information obtained by him by virtue of his position with the corporation.

If you find that plaintiffs, or any of them, made their decisions as to the number of franchises that were sold by Diners'/Fugazy Travel on the basis of the personal benefits it would yield to them, and not strictly

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on the basis of the best interests of the corporations, or if you find that the plaintiffs maintained a direct or indirect interest in the franchise office at 342 Madison Avenue during the time that they were officers and/or directors of Diners', or any of its subsidiaries, or if you find that the plaintiffs diverted business or opportunities of Diners' or any of its subsidiaries to any other entity for their own personal gain, or if you find that the plaintiffs concealed or willfully or recklessly failed to disclose to Diners' or any of its subsidiaries, during the time plaintiffs were officers and/or directors of Diners' or its subsidiaries, any information relating to the business or affairs of Diners' or any of its subsidiaries which if known to Diners', might have resulted in increased earnings or decreased losses for Diners' or any of its subsidiaries, you may return a verdict for the defendants against the plaintiff who you find to have breached his fiduciary duties on this claim.

If you find to your satisfaction that the defendants have established by a fair preponderance of the evidence that any or all of the plaintiffs breached their fiduciary duties to the defendants, Diners' and Diners'/Pugazy, you must further find the extent, if any, to which the defendants were decayed.

 For this type of claim, the plaintiffs would be liable to the defendants Diners' and/or Diners'/Fugazy Travel for any and all of the profits received by a plaintiff that flow from that plaintiff's violation of his fiduciary duties, for all losses suffered by Diners' and/or Diners'/Fugazy Travel as a result of those breaches, and for any and all compensation received by that plaintiff from Diners' and/or Diners'/Fugazy Travel.

In determining such damages, you may take into consideration that Diners'/Fugazy Travel suffered losses in the amount of approximately \$35,009,192; that the defendant Diners' paid to the plaintiffs in the aggregate of approximately \$400,000 in salaries and \$743,750 in franchise fee compensation; and that Diners' issued to the plaintiffs in exchange for the plaintiffs' cash compensation, rights, shares of Diners' common stock then valued at \$1,862,300.

Plaintiffs deny the allegations of the counterclaims and assert that they made no false representations to defendants and assert that Diners' losses were attributable solely to Diners' excessive expansion, poor management, and bad business judgment.

In short, they claim that no false representations and no failures to disclose were proved by defendants

Diners' or Diners'/Fugazy Travel, Inc.

I would note that any recital of contentions or evidence by me is not binding on you, since it is your recollection alone which is governing and supreme. The facts have been set forth at considerable length by both counsel in their summations, and I shall not go into them. I think the facts are clear in your minds. You have heard the witnesses, you have paid strict attention to their testimony, and you know from their lips what they say happened.

able to you for your study and consideration. It is for you to decide on the evidence presented and the rules of law I have given you whether plaintiffs, or any of them, are entitled to recover from the defendants, or any of them, or whether the defendants, or any of them, are entitled to recover from the plaintiffs, or any of them.

If you decide a party is not so entitled, you need go no further. You will return a verdict on the questions submitted as instructed in the special verdict form, which I will be handing to you in just a few minutes.

Only if you find by a preponderance of the evidence that all of the elements of a plaintiff's claim against a defendant, or a defendant's counterclaim against

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a plaintiff or defendant on the counter claim have been est blished shall you consider the question of damages.

You are to follow the law as I set it forth in this charge. Any verdict that you give here must be unanimous. I would like to point out that you should not enter the jury room with any preconceived pride of opinion; you should not be unwilling to be convinced by an intelligent argument with your fellow jurors.

Each juror, of course, has to answer to his own conscience; each has to decide the case for himself or herself. But in doing so, you should be willing to consider the views of your fellow jurors and talk it out and try your best to reach a unanimous agreement.

As I have indicated, both the testimony and the exhibits will be available to you. In addition, if you wish to hear any portion of my charge, that will be read back to you at your request.

I will close by saying that this is an important case. Each case is important to the parties who are concerned with it. It is important to the plaintiffs and to the defendants, and it is your obligation to decide it solely on the evidence and on the law as I have given it to you in this charge.

As I said before. I have prepared a form of

verdict which contains six separate questions. I will now read the questions to you. You will take the form into the jury room and depending on how you determine the case, the answers on the form will be made accordingly.

"PLAINTIFFS' FIRST CLAIM"

1. Did any of the defendants fraudulently induce plaintiffs Otto Marx, Jr., William D. Fugazy, or Louis V. Fugazy to relinquish certain rights they had to cash compensation under their October 10, 1967 employment agreements in exchange for consideration which included additional restricted shares of the Diners' Club, Inc. common stock? Answer yes or no.

verdict on plaintiffs' first claim is for defendants and you should proceed to question 3. If your answer to question 1 is "yes," state which defendants, individually, or acting with other defendants, defrauded which plaintiffs, and the amount of damages, if any, sustained by each plaintiff:

Defendants:	
The Diners' Club, Inc.	
Diners'/Fugazy Travel, Inc.	
The Continental Corp.	
The Continental Insurance Cc.	gazarra due ar . dec 🕶

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE FOLEYS. ARE NEW YORK, N.Y. CO.7 45HD

2	Plaintiffs:							
3	Otto Marx, Jr. Damages: \$							
4	William D. Fugazy Damages: \$							
5	Louis V. Fugazy Damages: \$							
6	"PLAINTIFFS' SECOND CLAIM"							
7	3. Did the Diners' Club, Inc. breach para-							
8	graph 10.2(b) of the acquisition agreement dated October							
9	0,1 1967, by failing to promptly file a registration state-							
10	ment with the Securities and Exchange Commission or by							
11	failing to use its best efforts to cause the registration							
12	statement to become effective? Answer "yes" or "no."							
13								
14	4. If your answer to question 3 is "no," your							
15	verdict on plaintiffs' second claim is for defendant							
16	Diners' Club and you should proceed to question 5. If							
17	your answer to question 3 is "yes," state the amount of							
18	damages, if any, sustained by each plaintiff:							
19	Plaintiffs:							
20	John V. Summerlin, Jr. Damages: \$							
21	Otto Marx, Jr Damages: \$							
22	William D. Fugazy Damages: \$							
23	Louis V. Fugazy Damages: \$							
24	"DEFENDANTS' COUNTERCLAIM"							
25	5. Did any of the plaintiffs or additional							

SOUTHERN DISTE OF COURT REPORTERS U.S. COURTHOUSE FOLEY'S AND NEWYORK NEW COLLAND

defendants on the counterclaim fraudulently induce the Diners' Club, Inc. to enter into the October 10, 1967 agreements or breach any agreements among the parties to violate any fiduciary duties to Diners' Club, Inc. and Diners'/Fugazy Travel, Inc., now known as Diners' World Travel, Inc.? Answer yes or no.

verdict on defendants' counterclaims is for plaintiffs and you need go no further. If your answer to question is "yes," state which plaintiffs or additional defendants on the counterclaims defrauded defendant the Diners' Club, Inc. or breached any agreements among the parties or viriated any fiduciary duties owed to the Diners' Club, Inc. and Diners'/Fugazy Travel, Inc. now known as Diners' World Travel, Inc. and the amount of damages, if any, sustained by each defendant:

Plaintiffs and Additional Defendants on the Counterclaims:

Marx & Co., Inc.	
John V. Summerlin, J	r.
Otto Marx, Jr.	
William D. Fugazy _	•
Louis V. Fugazy	
F.T. Ventures, Inc.	

Defendants:

The	Diners'	Club,	Inc.		Damages: \$	
Din	ers'/Fug	azy Tr	avel.	Inc.	Damages:	\$

At this time I have completed my charge and I will see counsel in the jury room. The jury will please wait in the box, and I would suggest at this time that the two alternate jurors go back to the jury room and reclaim any property they have and that they bring it back to the courtroom.

(In the robing room.)

THE COURT: Are there any exceptions to the charge or any requests for supplemental instructions?

(A discussion was had off the record.)

THE COURT: Yes, Mr. Fredericks?

MR. FREDERICKS: Your Honor, as we have agreed off the record, a charge with respect to causal relation-

In addition, your Honor, I am going to request a general charge, and your Honor has off the record agreed that we will get a general charge, on the jury's right to weigh the credibility of documents.

I will request, your Honor, a charge on the expert witness, which your Honor indicates that you will not give me, since you feel you have properly covered it

during the course of the trial at the time that the expert witness testified.

I would also request a charge to the extent that under the law it is the responsibility of Diners' to file a registration statement that complies with the disclosure and other requirements of the Federal Securities

Law. That charge, I believe, is properly set forth in our requests to charge on page 10 with the appropriate authorities to support that request, specifically, Boruski versus Division of Corporate Finance of the United States Securities and Exchange Commission, decided in this Court in 1971.

THE COURT: I will rule on your four requests as follows:

I will grant /our first request and would charge the jury:

"In connection with establishing damages it is a party's burden to prove a causal relationship between its claim of damages and the activities of the adverse party."

In addition, I will supplement my charge by charging:

"In addition to weighing the testimony of witnesses, which I mentioned during my main charge, you should
also weigh each document which you consider during your
deliberations."

Regarding your request relative to expert testimony, I suggest that I gave that charge during the course of the trial and I believe the jury has now been sufficiently charged on that matter.

Regarding your request that I charge that under the law it was the responsibility of Diners' to file a registration statement that complied with the disclosure and other requirements of the Federal Securities Laws, while I accept that proposition of law, I do not believe that such a supplement to my charge is necessary in the context of this case.

Therefore, I will grant your first two applications, and for the reasons given I will decline to supplement the charge on a matter of expert testimony and on the matter of the responsibility of Diners' Club as set forth in Boruski.

As I said with reference to that, I believe
Boruski to be the law; I do not believe it to be helpful
to my charge to add that request, and, therefore, I decline
to give it. You have your exceptions.

I would suggest only on the latter matter, which is the Boruski request--

MR. FREDERICKS: I agree, and those requests which have been denied by the Court--

my exception.

nesses?

THE COURT: By virtue of not having been included in the Court's charge? Is that what you are saying?

MR. FREDERICKS: That would not be four. I
have just asked for certain charges, two of which have
been denied me, and as to those I would like to maintain

THE COURT: You want to charge on expert wit-

MR. FREDERICKS: No.

THE COURT: So really it is just one, the one about Boruski.

MR. FREDERICKS: Yes.

THE COURT: Very well. The exception then, so the record is clear, is as to the Court's declining to charge under the law it was the responsibility of Diners' to file a registration statement that complied with the disclosure and other requirements of the Federal Securities Laws.

The Court's reason for not giving that particular request to charge has already been set forth, and I will not repeat it. You have your exception on that one request.

Is there anything further, Mr. Fredericks, regarding the charge?

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MR. FREDERICKS: No, your Honor.

THE COURT: Turning now to the defendants, Mr. Santora?

MR. SANTORA: Only to repeat, your Honor, our discussion off the record wherein I requested in respect to your Honor's charge concerning plaintiffs' first-claim to include in the listing of consideration given to the plaintiffs the 38,200 odd shares of Diners' stock, wherein your Honor indicated it was not necessary to supplement the charge at this time, but should another request come out from the jury, your Honor will supplement it at that time in this regard. That is my only request.

Stated to the jury that any recital of contentions or evidence by me was not binding upon the jury, since it was the jury's recollection which governed. I believe I spoke to the matter of the stock at another time in my charge, and I will tell you now if the jury does make a request regarding the consideration given, if you will remind me at the time we are preparing a response, I will include the stock at that time.

Is there anything else which you have in the way of either exceptions to the charge or requests for supplementary instructions beyond that to which you already

addressed yourself?

MR. SANTORA: No, your Honor.

THE COURT: Very well.

(Proceedings continued in the courtroom.)

THE COURT: Ladies and gentlemen, before you leave the courtroom to begin your deliberations I wish to supplement my main charge with two further instructions:

The first is that in connection with establishing damages, it is a party's burden to prove a causal relationship between its claim of damages and the activities of the adverse party;

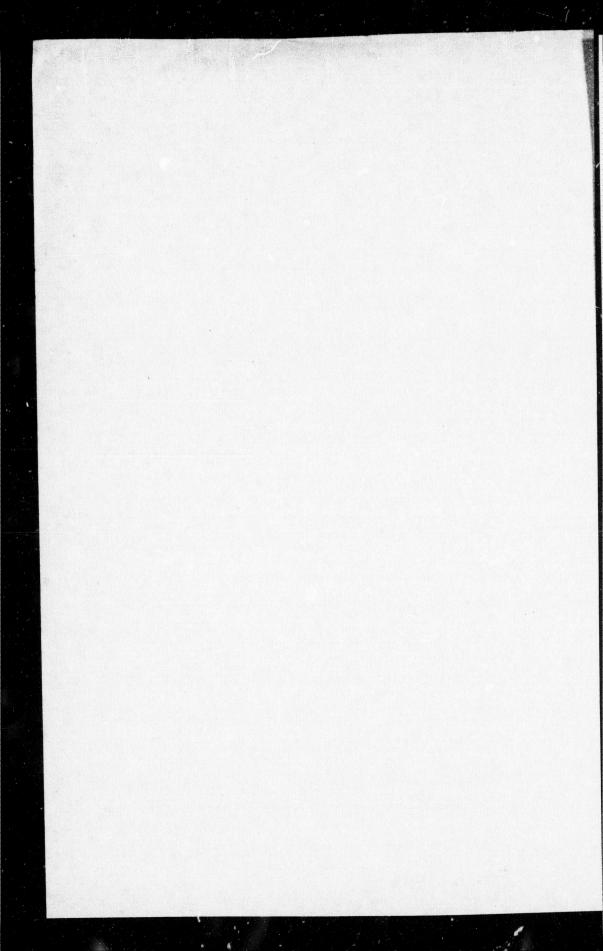
Two, in addition to weighing the testimony of witnesses, which I mentioned during my main charge, you should also weigh each document which you consider during your deliberations.

I have now supplemented my charge. I hand the verdict form to your forelady and note that copies have been furnished to and are in possession of counsel.

Miss Kruger, does the jury have paper and pencils?

THE CLERK: The marshal has, yes, sir.

THE COURT: At this time I will excuse the jury and direct them to proceed to the jury room after we have sworn the marshal, and at the point they enter the



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

______X

Plaintiffs, : OPINION

-against-

70 Civ. 3064

THE DINERS' CLUB, INC., DINERS'/FUGAZY
TRAVEL, INC., THE CONTINENTAL CORPORATION, :
and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

-against-

WILLIAM D. FUGATY and LOUIS V. FUGAZY

Third-Party Defendants.

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WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

72 Civ. 4324

THE DINERS' CLUB, INC., DINERS'/FUGAZY
TRAVEL, INC., THE CONTINENTAL CORPORATION
and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR.,

> Additional Defendants on the Counterclaims.

HARRIS; FREE ACKS & KOROBKIN, ESQS. 1271 Avenue of the Americas New York, New York 10019 Attorneys for Plaintiffs,

BARRY I. FREDERICKS, ESQ. Of Counsel

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, ESQS. 299 Park Avenue New York, New York 10017 Attorneys for Plaintiffs,

JAMES E. TOLAN, ESQ. Of Counsel

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Plaintiffs commenced these actions in 1970 and 1972, respectively, alleging, inter alia, that defendant The Diners' Club, Inc. ("Diners'") breached a contract to register certain unregistered Diners' stock held by them. In addition, plaintiffs asserted two claims alleging violations of \$10(b) of the Securities Exchange Act of 1934 (15 U.S.C. \$78j(b)), and Rule 10b-5 promulgated thereunder. Defendants denied plaintiffs' allegations and asserted various counterclaims. Following a trial which began on May 6, 1975 and concluded on May 28, 1975, the jury returned a verdict for plaintiffs on their contract claim and on defendants' counterclaims, awarding a total of \$533,000 in damages on the former. The Court dismissed one of the plaintiffs' \$10(b) claims at the end of their case and the jury returned a verdict for defendants on the other \$10(b) claim.

Diners' moves pursuant to Rules 50 and 59, Fed. R.

Civ. P., for judgment notwithstanding the verdict on plaintiffs'
contract claim or, in the alternative, for a new trial or
remittitur. In addition, defendants Diners' and Diners'
World Travel, Inc., formerly known as Diners'/Fugazy Travel,
Inc. ("DWT") move for judgment notwithstanding the verdict
and a new trial with respect to their counterclaims.

withstanding the verdict on the grounds that plaintiffs failed to produce sufficient evidence to meet their burden of proof; that the verdict of the jury necessarily involved an erroneous determination of law; and that the evidence was overwhelmingly in their favor. A new trial is sought on the grounds that the verdict is contrary to the weight of the evidence; and that the Court made prejudicial errors in its rulings during trial, principally in permitting Stanley Friedman, a witness not identified in the pre-trial order, to testify as a rebuttal witness. A new trial or remittitur is sought on the ground that the jury made an erroneous determination of plaintiffs' damages. For the reasons set forth below, the motions are in all respects denied.

The facts, briefly, are these. Under an agreement dated October 10, 1967, Diners' acquired the assets of Fugazy Travel Bureau for unregistered Diners' stock and other consideration. Paragraph 10.2(b) of the agreement provided that Diners', upon receipt of notification from plaintiffs that they desired registration, would promptly file a registration statement for the unregistered Diners' stock held by plaintiffs and would use its best efforts to cause the registration statement to become effective.

On April 16, 1969, plaintiffs wrote a letter requesting Diners' to file a registration statement with respect to their Diners' stock. Instead of directing the preparation of a registration statement, George Faunce, then president of Diners', forwarded a copy of plaintiffs' letter containing the following notation to Harold Johnson, one of its directors, and executive vice president of The Continental Insurance Company ("Continental") which held a controlling interest in Diners':

"Harold -- Alfred [Bloomingdale, Diners' board chairman] asked me to send this to you and [Victor] Herd [Continental's board chairman]. He wants to know your position --

George"

A letter dated April 24, 1969 from Johnson to Hord enclosing a copy of the April 16, 1969 request contained the following statement:

"The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.

"To my way of thinking there is nothing that needs to be done at the present time. Mr. Bloomingdale may discuss this at a later date but my reaction is to do nothing."

(emphasis added)

Although Diners' was requested to file a registration statement in mid-April, 1969, it is undisputed that Diners' did nothing to register the stock until late July, 1969, more than three months after receiving the letter requesting registration

and almost two months after its financial statement for the fiscal year ended March 31, 1969 became available. From the foregoing, the jury could reasonably infer that Diners', with the urging and approval of Herd and Johnson, decided to do nothing and thereby avoid its obligations under paragraph 10.2(b) of the agreement.

It is clear that the motion for judgment notwithstanding the verdict on the grounds that it is against the
weight of the evidence and that the verdict of the jury
necessarily involved an erroneous determination of law
must be denied. The standard on such a motion is the same
as the standard for a directed verdict, that is, whether
there was evidence from which the jury could have properly
found for plaintiff, against whom the motion is made, viewing
the evidence most favorable to him and giving nim the benefit
of all reasonable inferences. 9 Wright and Miller, Federal
Practice and Procedure §2524 (1971); Simblest v. Maynard,
427 F.2d 1, 4 (2d Cir. 1970). Viewed in this light, the
evidence presented was certainly sufficient to permit the case
to go to the jury.

Plaintiffs presented sufficient evidence to make out a prima facie case that Diners' had breached its agreement by failing to premptly file a registration statement. Preparation of the registration statement did not begin until late

July, 1969 and it was not filed until August 28, 1969.
Although Diners' argued that it used its best efforts
to cause the registration statement to become effective,
it never became effective, having been withdrawn early
in 1970 over the protest of plaintiff Marx.

At trial Diners' contended, and contends on these motions, that it was not responsible for the delay in filing but rather that the delay was occasioned by plaintiffs' failure to perform the conditions precedent to Diners' obligation to file. Diners' contends that its obligation to register plaintiffs' shares was subject to receipt of an amount sufficient to reimburse it for one-half of all registration expenses and delivery by plaintiffs of an indemnity agreement. Further, Diners argues that upon receipt of the registration request it had two other performance options under the agreement, either of which could be pursued in lieu of registration.

Although it is ordinarily true, as Diners' argues, that a plaintiff must prove as an element of his cause of action for breach of contract the due performance by him of all conditions precedent, sec, e.g., Marine Trust Co. of Buffalo v. Gilfillan, 258 A.D. 296, 17 N.Y.S.2d 107 (4th Dep't 1939); 3A A. Corbin, On Contracts \$628, at 16 (1960), it is equally vell-settled that a party cannot insist upon a condition precedent when he himself has caused its non-

performance. Wagner v. Derecktor, 306 N.Y. 386, 118 N.E.2d 570 (1954). From the evidence adduced at trial, the jury could have reasonably determined that upon receipt of plaintiffs' request Diners' did nothing. It failed to elect from among the options for performance available to it under the agreement and did not request a specific amount from plaintiffs representing one-half the registration costs until July 15, 1969, well after the registration statement should have been filed. Further, the sum finally requested was considerably in excess of the reasonable expenses to be incurred. It was not until August, 1969 that Diners' even raised the question of plaintiffs providing the indemnity agreement, although in the April 16, 1969 letter plaintiffs offered to provide one in accordance with the terms of the October 10, 1967 agreement. From all these facts, the jury could have reasonably concluded that Diners' acted in bad faith and thereby prevented or hindered performance of the conditions precedent in order to avoid its obligation to file a registration statement.

Moreover, Diners' contentions were covered in the Court's charge without objection by defendants. Rule 51, Fed. R. Civ. P., specifically provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider

its verdict, stating distinctly the matter to which he objects and the grounds of his objection." A party cannot resurrect such an objection on a motion for judgment not-withstanding the verdict. Jennings v. Boenning & Co., 388

F. Supp. 1294, 1303-04 (E.D. Pa. 1975); see Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir.), cert. denied, 414 U.S. 857 (1973).

Diners' also argues that the parties entered an accord on August 27, 1969, thereby precluding plaintiffs from asserting any claim based on whatever superseded obligation Diners' may have had. Rule 8(c), Fed. R. Civ. P., requires that an accord be affirmatively pleaded, which does not appear to have been done. Diners' attempt to assert this affirmative defense after trial must be rejected.

Defendants also move for a new trial on the ground that the verdict was against the weight of the evidence.

The standard by which evidence is judged on a motion for a new trial is less stringent than upon a motion for judgment notwithstanding the verdict. However, determination of that motion rests within the sound discretion of the trial court to see that there is no miscarriage of justice. 6 A. Moore's Federal Practice [59.08[5] (1972). As discussed above, there was sufficient evidence to warrant submission of the case to the jury. Upon review of the probative evidence in the case,

together with the inferences which the jury could reasonably have drawn therefrom, and evaluating all the testimony, the Court is persuaded that the jury's verdict was neither unsupported by the evidence, nor against "the right and justice of the case." Wright and Miller, supra, \$2531.

Defendants raise additional claims of error, arguing that there were occurrences at the trial which were sufficiently grave and had consequences so prejudicial that these errors require a new trial. These claims revolve around the Court's permitting plaintiffs to call Stanley Friedman, a witness not named in the pre-trial order, as a rebuttal witness over . 4 defendants' objection.

First, defendants contend that Friedman was a surprise witness and that they were, therefore, unable to prepare for his cross-examination. This contention is without merit. It was within the Court's discretion to permit Friedman to testify and the fact that he was not listed in the pre-trial order, standing alone, does not warrant a new trial. See Stewart v. Movers, 353 F.2d 691 (7th Cir. 1965). Plaintiffs' counsel supplied defendants with Friedman's name and the subject on which he would testify as an expert witness one week before he was called to testify. Within that week there were two full weekdays, in addition to the weekend, during which no proceedings were had in the trial.

There was, thus, sufficient notice to defendants to enable them to prepare for Friedman's testimony. Moreover, at no time did defendants' counsel request a continuance to prepare for cross-examination or to obtain their own expert. In light of all the facts and circumstances, no substantial injustice resulted from permitting Friedman to testify.

Defendants next contend that although it may have been proper for Friedman to testify on plaintiffs' direct case, it was error to permit him to testify on rebuttal. It was within the discretion of the Court to permit expert testimony on rebuttal. See Sanchez v. Safeway Stores, Inc., 451 F.2d 998 (10th Cir. 1971); Casey v. Seas Shipping Co., 178 F.2d 360 (2d Cir. 1949). Diners' defense to plaintiffs' contract claim was that it had no duty to file the registration statement until August and that its duty was fully discharged by the actions taken. Mr. Friedman gave his opinion, in rebuttal, that a registration statement should have been filed by June 20, 1969 and become effective by the end of August, 1969. Accordingly, it was not error to permit him to testify on rebuttal.

Nor was it prejudicial error to allow Friedman, an expert witness, to give his opinion as to when the registration statement should have been filed or the time within which the registration statement should have become effective or to

allow him to testify in reliance on the 1970 SEC Annual Report. The admission of Friedman's expert testimony, subject to the limiting instructions given at trial, was a proper exercise of the trial court's discretionary power over the progress of the trial. United States v. Cohen, Dkt. Nos. 74-2026-2027-2065 (2d Cir. June 26, 1975).

Diners' also argues that the jury made an erroneous determination of plaintiffs' damages. The Court having found that the jury's verdict was neither unsupported by the evidence nor against "the right and justice of the case," and no objection having been taken to the Court's charge on damages, one of the alternative measures of damages being the damages awarded by the jury, this argument must be rejected.

Finally, defendants contend that the plaintiffs'

verdict on their counterclaims was against the weight of the

evidence. The primary claim pressed on this motion is that

plaintiffs maintained an interest in Travelco, Inc. ("Travelco"),

undisclosed to defendants, in violation of the October 10, 1967

agreement and their fiduciary responsibilities. At trial,

the evidence produced on behalf of defendants tended to estab
lish that plaintiffs had agreed prior to Diners' acquisition

of Fugazy to indemnify the purchaser of their interest in

Travelco in the event he was held liable on a guarantee of

a bank loan to the corporation. Additionally, plaintiffs had

an option to purchase a controlling interest in Travelco in the event the bank loan was repaid. The Fugazy's were, also, officers and directors of Travelco.

Plaintiffs denied retaining any interest in Travelco and testified that they had fully divested themselves of all interests, direct or indirect, by October 30, 1967. Evidence introduced by plaintiffs tended to establish that the terms of the Travelco transaction were disclosed to defendants. Further, they testified that the management services contract between Fugazy Travel Bureau and Travelco and the nature of the business required the Fugazy's to remain officers and directors of Travelco. They further testified, without contradiction, that they were officers and directors of many Fugazy franchises and that this was known to defendants. It is undisputed that the management services contract was disclosed to defendants at the time of Diners' acquisition of Fugazy.

The jury chose to believe plaintiffs. All the evidence was presented and counsel for defendants ably made the same arguments to the jury as he now makes to this Court. Moreover, defendants concede that the jury was correctly charged on the law. Defendants bore the burden of persuasion and it cannot be said that the jury's verdict was without support in the evidence. The portion of defendants' motion which seeks a new trial on their counterclaims is, accord-

ingly, denied.

The Court has considered the other arguments which defendants advance and finds defendants' contentions to be without merit. Therefore, the motions are in all respects denied.

It is so ordered.

Dated: September 23, 1975

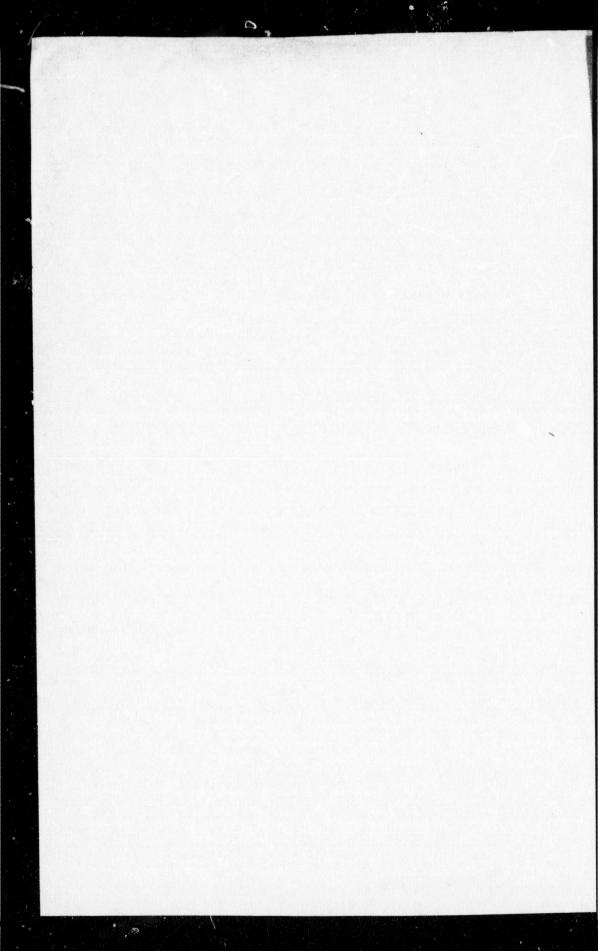
NOTES

1 Paragraph 10.2(b) provides:

If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may, at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expediticusly and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a "no-action" letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement. The notifying holders shall pay Diners in advance, an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket empenses incurred in connection with such registration statement.

2 Diners' appears to argue that plaintiffs' contract claim was limited to Diners' failure to exercise its best efforts to cause the registration statement to become effective. It contends that the claim did not take the form in which it was submitted to the jury until plaintiffs presented their rebuttal evidence. In fact, from the outset of the trial plaintiffs contended that Diners' breached the October 10, 1967 agreement both in the failure to promptly file a registration statement and the failure to use its best efforts to cause the registration statement, ultimately filed, to become effective. In light of the numerous instances throughout the trial in which the contract claim was outlined by the plaintiffs and the Court, and Diners' agreement to the form of the special verdict submitted to the jury, Diners' belated argument that only the failure to use "best efforts" was in issue must be deemed an afterthought.

- 3 See amended answer filed January 28, 1971 (70 Civ. 3064); and answer and counterclaims filed January 15, 1973 (72 Civ. 4324).
- The trial transcript does not reflect that defendants objected to the calling of Mr. Friedman. Defendants have applied to the Court to correct the record to note their objection. It is the Court's recollection that at a conference between counsel and the Court, after the jury had left the courtroom, plaintiffs' counsel indicated his intention to call an expert witness on his rebuttal case. Counsel for defendants objected to the calling of a witness not listed in the pre-trial order. The Court, after requiring plaintiffs' counsel to name the rebuttal witness, overruled counsel's objection and indicated he could testify. Mr. Friedman testified one week later. Inasmuch as the conference does not appear to have been transcribed, the record is deemed corrected to reflect defendants' objection and the Court's ruling.



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK -----X MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR., · Plaintiffs, -against-70 Civ. 3064 THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, : and THE CONTINENTAL INSURANCE COMPANY, Defendants, -against-WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Third-Party Defendants. WILLIAM D. FUGAZY and LOUIS V. FUGAZY, . Plaintiffs, -against-72 Civ. 4324 THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY, Defendants, MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR., Additional Defendants on the Counterclaims.

Plaintiffs Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy move for an order, pursuant to Rule 58, Fed. R. Civ. P. and N.Y.C.P.L.R. \$\$ 5001, 5004 (McKinney 1963 and Supp. 1975), setting the date from which interest shall be computed on the verdict rendered in their favor by the jury on May 28, 1975. Defendants oppose the motion and ask the Court to tax plaintiffs with the costs of this litigation.

The facts were fully set forth in this Court's opinion reported at 400 F. Supp. 581 (S.D.N.Y. 1975) and only those facts which are necessary to the determination of this motion are repeated here. Plaintiffs commenced these two actions in 1970 and 1972 alleging, in each complaint, two violations of \$10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder. Additionally, the complaints asserted pendent state claims for breach of a contract to register shares of unregistered Diners' Club, Inc. ("Diners'") stock held by plaintiffs. The jurisdiction of this Court was invoked pursuant to 527 of the Securities Exchange Act of 1934 (15 U.S.C. §77an). At trial, one of the two securities claims was dismissed by the Court and the jury found for defendants on the second. However, plaintiffs recovered on the pendent state law breach of contract claims.

Plaintiffs now seek to have the date from which pre-verdict interest shall accrue set by the Court. They argue that under state law they are entitled to pre-verdict interest computed from the earliest ascertainable date their contract causes of action existed as a matter of right.

Defendants argue that state law does not apply in actions where jurisdiction is founded upon a federal ground. Their argument is premised on the assertion that the doctrine of Eric Railroad v. Tompkins, 304 U.S. 64 (1938) requires the application of state law only in cases within the divertity jurisdiction of the federal courts. This contention cannot be sustained. Whether state law is to be applied depends upon the nature of the issue before the federal court and not the basis for its jurisdiction. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 533, 540 n.1 (2d Gir. 1956); lA J. Moore, Federal Practice ¶ .305[3] (1974). As the court in Eric stated:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."
304 U.S. at 70.

Thus, it is the source of the right sued upon which is determinative of whether state law should be applied.

Maternally Yours, Inc. v. Your Maternity Shop, Inc., supra.

In Mintz v. Allen, 254 F. Supp. 1012 (S.D.N.Y. 1966), the court was presented with a contention similar to that urged by the defendants. The court held that state law should be applied to pendent state law claims in a shareholders' derivative action where jurisdiction was predicated upon the Investment Company Act of 1940.

In the instant actions, the contract claims arise solely under state law. The claims were submitted to the jury as controlled by state law. Indeed, even defendants in their post-trial motions treated the contract claims as controlled by state law. Accordingly, the Court holds that state law applies to the question of pre-verdict interest on the pendent contract claims under Eric as it would had the claims arisen pursuant to the Court's diversity jurisdiction. Julien J. Studley, Inc. v. Gulf Oil Corp., 425 F.2d 947 (2d Cir. 1969); St. Clair v. Eastern Airlines, Inc., 302 F.2d 477 (2d Cir. 1962); Earnest v. Donald Deskey Associates, Inc., 312 F. Supp. 1312 (S.D.N.Y. 1970).

Under New York law, the successful plaintiff in an action for breach of contract is entitled as of right to interest computed from the earliest ascertainable date the cause of action existed. N.Y.C.P.L.R. §5001; 5 Weinstein, Korn, Miller, New York Civil Practice, \$\frac{4}{3}\$ 5001.04, .10 (1974).

The statute provides for submitting to the jury the question of the date from which interest shall be calculated and, if the jury is discharged without specifying the date, the court shall fix the date. N.Y.C.P.L.R. §5001(c). Plaintiffs contend that the earliest date the causes of action existed was September 1, 1969. Defendants contend the earliest ascertainable date the causes of action can be said to exist is the commencement of the trial in May, 1975.

In fixing the date under \$5001(c), the Court must determine what damages the jury's award represented. Julien J. Studley, Inc. v. Gulf Oil. Corp., supra; Earnest v. Donald Deskey Associates, Inc., supra. In effect, the Court must ascertain the earliest dath the damages were sustained based upon the jury's award. See Temple Beth Sholom v. E.M. Fitzsimmons and Associates, Inc., 42 A.D.2d 739, 345 N.Y.S.2d 680 (2d Dep't 1973). When it is impossible to ascertain the earliest date represented by the jury's award, pre-verdict interest is computed from the commencement of the action. Sce, e.g., Earnest v. Donald Deskey Associates, Inc., supra; Temple Beth Sholom v. E.M. Fitzsimmons and Associates, Inc., supra. Consequently, the latest possible dates from which interest should be computed are 1970 and 1972, respectively. Defendants argument that interest should be computed from the commencement of the trial must, therefore, be rejected.

However, the jury's award in the instant case clearly represents damages sustained prior to the commencement of these actions. Throughout the trial plaintiffs contended that had Diners' not breached its agreement to register their stock, the stock would have been effectively registered by late August, 1969. Defendants vehemently disputed this contention. The jury found for plaintiffs and awarded damages representing the difference between what plaintiffs received for their stock and what they would have been able to receive had the stock been registered by August, 1969. Accordingly, the earliest ascertainable date plaintiffs' contract causes of action existed is September 2, 1969. Indeed, defendants' argument to the contrary represents an attempt to relitigate the question determined adversely to them by the jury and by this Court on their motion for a new trial or remittitur.

The next question is the rate at which interest should be computed. N.Y.C.P.L.R. §5004, which became effective September 1, 1972, prescribes the rate of interest as 6%. Accordingly, interest for the period subsequent to September 1, 1972 shall be computed at 6%. The difficulty arises with respect to the applicable rate of interest between September, 1969 and September, 1972. Plaintiffs contend that during this period interest should be calculated at

7 1/2%. Defendants apparently do not dispute that this was the rate during that period. Nonetheless, the Court has examined the available New York law and determined that \$5004 is not retroactive and that interest prior to September, 1972 should be computed at 7 1/2%. 7 Doyer Street Realty Corp. v. The Great Cathay Development Corp., 43 A.D.2d 476, 352 N.Y.S.2d 483 (1st Dep't 1974); Rachlin & Co. v. Tra-Mar, Inc., 33 A.D.2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970); Yamamoto v. Costello, 73 Misc.2d 592, 342 N.Y.S.2d 33 (Sup. Ct. 1973); 5 Weinstein, Korn and Miller, \$15004.01 (1974).

Accordingly, the Court holds that plaintiffs are entitled to interest on the jury's award computed from September 2, 1969 at the rate of 7 1/2% up to and including August 31, 1972 and at 6% thereafter.

Finally, defendants seek to recover their costs pursuant to Rule 54(d), Fed. R. Civ. P. Recognizing that ordinarily plaintiffs, who recover a judgment, would, also, recover their costs, defendants appeal to the Court's discretion to award them costs.

Under Rule 54(d), the court has discretion in awarding costs. See Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964); McDonnell v. American Leduc Petroleums, Ltd., 456 F.2d 1170 (2d Cir. 1972). The Court, in the exercise

of its discretion, has determined that with the exception of defendants The Continental Corporation and The Continental Insurance Corporation ("the Continental companies"), each party should bear its own costs. The litigation was protracted, involving numerous claims and counter-claims.

Except for the Continental companies, no party was completely successful. In light of all the facts and circumstances, costs are awarded the Continental companies. Each of the other parties shall bear its own costs.

Settle judgment on notice.

Dated: December 17, 1975

